

In The Supreme Court

Appeal from the Court of Appeals  
Presiding Judge, Jessica R. Cooper

**ANTONIO CRAIG**, minor, by his  
Next Friend, Co-Conservator and Mother,  
**KIMBERLY CRAIG**,

Plaintiff-Appellee

Docket No. 121419

vs.

Court of Appeals Case No.: 206951

**OAKWOOD HOSPITAL**,  
a Michigan Corporation

Wayne County Circuit Court  
Case No.: 94-410338 NH  
Hon. Carole F. Youngblood

Defendant-Appellant  
and

**HENRY FORD HOSPITAL d/b/a HENRY  
FORD HEALTH SYSTEM**, a Michigan Corporation,  
**ASSOCIATED PHYSICIANS, P.C.**, and  
**ELIAS G. GENNAOUI, M.D.**,

Defendants

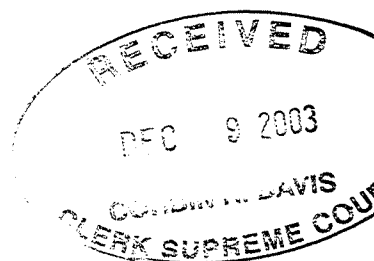
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**BRIEF ON APPEAL - BY PLAINTIFF-APPELLEE IN RESPONSE TO  
APPELLANT OAKWOOD HOSPITAL**

**ORAL ARGUMENT REQUESTED**

**Mark L. Silverman, M.D. (P42992)**  
Attorney for Plaintiff-Appellee

**MARK L. SILVERMAN, M.D., J.D., P.C.**  
401 S. Old Woodward Ave., Ste. 435  
Birmingham, MI 48009  
(248) 647-0390/fax: (248) 647-9142



## TABLE OF CONTENTS

|  | <u>Page</u> |
|--|-------------|
| INDEX OF AUTHORITIES .....   | iv          |
| STATEMENT OF BASIS OF JURISDICTION .....   | vii         |
| STATEMENT OF QUESTIONS PRESENTED .....   | viii        |
| I. INTRODUCTION .....  | 1           |
| II. COUNTER-STATEMENT OF FACTS .....   | 8           |
| III. ARGUMENT .....  | 29          |
| Standards of Review .....  | 30, 42      |
| A. Given the Fact That the Lower Court, on the Record, Granted Oakwood's Request to File Further Pleadings on the Davis-Frye Issue Prior to Dr. Gabriel Taking the Stand, That the Court Stated the Denial of the Hearing Request Was Just Her Ruling "Today" and That Oakwood Could "Submit Anything Additional" and She "Will Take a Look at It," [20a, Lines 12-15, and 21a, Lines 5-8], That Oakwood Agreed on the Record That it Would Do So, and the Record Is Clear That No Further Pleadings Were Ever Filed as to the Davis-Frye Issue, and the Davis-Frye Hearing Was Never Raised by Oakwood Before the Verdict, this Court Should Find That Oakwood Abandoned Their Request for a Davis-Frye Hearing, Failed to Preserve It, and Deny Their Desperate Attempt to Resurrect it on Appeal..... | 29, 30      |
| B. Given the Fact That Oakwood Identified the Basis for the Pre-trial Request for a Davis-Frye Hearing as an Alleged Dispute over "Whether Pitocin Can Cause Traumatic Head Injury Against Mother's Anatomy," [17a, Lines 21-25], Which Every Trial Witness Established as Universally Held as True, this Court Should Rule That the Complete Lower Court Record Makes it Clear That There Was No Bona Fide Davis-Frye Issue or "Novel" Davis-Frye Evidence Ever Raised in the Lower Court and That the Lower Court Did Not Err When Asking That the Request for a Davis-Frye Hearing Be Accompanied by Something More than the Attorney's Own Words.....  | 30          |
| C. When a Davis-frye Hearing Request Was Made by Defendant Without Any Expert Affidavit or Literature Support, and the Plaintiff Came Forward in His Response [6b - 10b] with Substantial Evidence of Widespread Scientific Support, Reliability and Acceptance of One of His Challenged Expert's Testimony Which Expressed a Pitocin Induced Head Compression Trauma Mechanism  |             |

of Fetal Head Injury, and the Response Included Main Stream Literature Citations, Neonatology Textbook Excerpts and the Physicians Desk Reference (Pdr), Which Is Overseen by the FDA, the Lower Court Did Not Err to Have Denied Oakwood's Request on the Day of the Hearing and Instead to Have Granted Oakwood's Request to File Further Pleadings.....30

- D. When Plaintiff's Expert, Board Certified Obstetrical Expert Dr. Paul Gatewood, Was Competent to Testify to the Obstetrical Standard of Care, and Pediatric Neurologist Expert Dr. Gabriel Was Competent to Testify as to Brain Damage Causation, and Each on the Record Appropriately Deferred to the Other's Specialty, and Each Based the Expert Testimony upon the Facts in the Medical Records and Admitted Exhibits, the Lower Court Did Not Err in Allowing Their Testimony, and Motions for JNOV and Directed Verdict Were Correctly Denied.....41

IV. CONCLUSION AND REQUESTED RELIEF .....49

## INDEX OF AUTHORITIES

| Cases  | Page(s) |
|--|---------|
| <u>Anderson v Liberty Lobby, Inc.</u> , 477 U.S. 242; 106 S. Ct. 2505; 91 L. Ed.2d 202 (1986).....                               | 45      |
| <u>Carbonell v Bluhm</u> , 114 Mich app 215, 222; 318 NW2d 659, 662 (1982) .....   | 31      |
| <u>Dundee v Puerto Rico Marine Management, Inc.</u> (1985) 147 Mich App 254, 383 NW2d 176,<br>app den (1986) 425 Mich 858. ....  | 42      |
| <u>Farwell v Keaton</u> (1974), 51 Mich App 585, 215 NW2d 753, rev'd on other grounds (1976)<br>396 Mich 281, 240 NW2d 217. .... | 42      |
| <u>Gagnon v Dresser Industries Corp.</u> , 130 Mich App 452, 463; 344 NW2d 582 (1983), aff'd 424<br>Mich 166 (1985) .....        | 31, 42  |
| <u>Green v Jerome-Duncan Ford, Inc.</u> , 195 Mich App 493, 498 (1992) .....   | 42      |
| <u>Holloway v General Motors Corp</u> (On rehearing), 403 Mich 614, 623;<br>271 N.W.2d 777 (1978) .....                          | 49      |
| <u>Jones v Sanilac County Rd. Com.</u> (1983), 128 Mich App 569, 342 N.W.2d 532,<br>app den (1984), 419 Mich 936. ....           | 42      |
| <u>Jones v Porretta</u> , 428 Mich 132, 158-159, 405 N.W.2d 863 (1987) .....   | 35      |
| <u>Kaminski v Grand Truck Western Railroad Company</u> , 347 Mich 417, 422;<br>79 NW2d 899, 901 (1956) .....                     | 47, 48  |
| <u>Mulholland v DEC Int'l</u> , Mich 395, 416; 443 NW2d 340 (1989) .....   | 44, 49  |
| <u>People v King</u> , 158 Mich App 672, 675; 405 N.W.2d 116 (1987) .....  | 31      |
| <u>People v Marsh</u> , 177 Mich App 161; 441 N.W.2d 33 (1989) .....   | 31, 41  |
| <u>People v Salvatore</u> , 415 Mich 615; 329 N.W.2d 743 743 (1982) .....  | 37      |
| <u>People v Watts</u> , 145 Mich App 760, 764; 378 N.W.2d 787 (1985),<br>lv den 424 Mich 889 (1986) .....                        | 35      |

|  |           |
|--|-----------|
| <u>People v Young</u> , 418 Mich 1, 340 N.W.2d 805; (1983)   | 1, 31, 37 |
| <u>Rouch v Enquirer &amp; News</u> (1990), 184 Mich App 19, 457 N.W.2d 74, 17 Media LR 2305, app gr (1991),<br>437 Mich 1035, 472 N.W.2d 637 and vacated on other grounds (1992), 440 Mich 238,<br>487 N.W.2d 205, 20 Media L R 2265, reh den (1992), 440 Mich 1209, 488 N.W.2d 736<br>and cert den (1993), 507 US 967, 122 L. Ed. 2d 774, 113 S Ct 1401, reh den (1993)<br>507 US 1407, 123 L Ed 2d 507, 113 S Ct 1891. | 30, 42    |

|  |            |
|--|------------|
| <u>Skinner v Square D Company</u> , 445 Mich 153, at 165; 516 N.W.2d 475 | 44, 45, 48 |
|--|------------|

|  |    |
|--|----|
| <u>Slocum v Ford Motor Co.</u> (1981) 111 Mich App 127, 314 NW 2d 546. | 42 |
|--|----|

|   |        |
|---|--------|
| <u>Spalding v Spalding</u> , 355 Mich 383, 384-5; 94 NW2d 810(1959) | 31, 42 |
|---|--------|

## Rules

|                         |        |
|-------------------------|--------|
| MCR 2.116 ( C)(10)      | 34     |
| MCR 2.116( C)(10)(G)(3) | 34     |
| MCR 2.116 (C)(10)(G)(4) | 34     |
| MCR 2.613(A)            | 31, 42 |
| MRE 702                 | 31     |

## Statutes

## Other

|   |    |
|---|----|
| J.F. Jewitt, M.D., <i>Induction of Labor and Amniotic Fluid Infusion</i> ,<br>The New England Journal of Medicine, Massachusetts Medical Society,<br>Committee on Maternal Welfare, p. 548-9, (March 4, 1976) | 18 |
| John H. Menkes, <i>Textbook of Child Neurology</i> , 5 <sup>th</sup> Ed., p.278   | 46 |
| 1995, or 49 <sup>th</sup> Edition, pages 2708 and 2709, of the <i>Physician's Desk Reference</i> ("PDR")  | 33 |

|  |    |
|--|----|
| <i>Neonatology, Pathophysiology and Management of the Newborn,</i><br>by Gordon B. Avery, M.D. Ph.D., 2d Ed., 1981 ..... | 33 |
| Prosser & Keeton, <i>Torts</i> (5 <sup>th</sup> Ed), § 41, p. 269 .....  | 44 |
| <i>Williams Obstetrics</i> , 20 <sup>th</sup> Edition, page 428 (1997) .....   | 12 |

## **STATEMENT OF BASIS OF JURISDICTION**

The jurisdictional summary in Oakwood's Brief appears complete and correct. MCR

7.302(F)

## **STATEMENT OF QUESTIONS PRESENTED**

I. Whether Plaintiff's witness' testimony was based on facts not in evidence?

The trial court answered: No.

The Court of Appeals answered: No.

Plaintiff-Appellee answers: No.

Oakwood answers: Yes.

II. Whether the trial court and the Court of Appeals erred in permitting the testimony of Plaintiff's expert witnesses?

The trial court answered: No.

The Court of Appeals answered: No.

Plaintiff-Appellee answers: No.

Oakwood answers: Yes.



"PLACENTIN: ...Ugh!" Lenina shuddered. "How I loathe intravenals, don't you?"  
Aldous Huxley, BRAVE NEW WORLD (1932), p. 38, 1<sup>st</sup> Perennial Classics Ed.

## **I. INTRODUCTION**

This Brief will address the two limited issues identified in this Court's September 12, 2003 granting Order [82a] with respect to Defendant-Appellant Oakwood only:

Whether the witness' testimony was based on facts not in evidence and whether the trial court erred in permitting the testimony of plaintiff's expert witnesses. See People v Young, 418 Mich 1, 21, n7 (1983)...In all other respects, the application for leave to appeal is DENIED.

For the sake of clarity and efficiency, the complete facts surrounding the issue of permitting the testimony of plaintiff's expert witnesses, will be expressed in the first Argument section of this Brief. Oakwood omits from its Brief or Appendix a copy of its actual Motion In Limine To Exclude Testimony From Ronald Gabriel, M.D. which is in plaintiff's Appendix. [1b-5b]. In short, the Motion In Limine asked the court to exclude Ronald Gabriel's testimony but failed to identify or specify where in the deposition transcript they felt his causation testimony departed from accepted or reliable science. Oakwood attached the entire transcript of Dr. Gabriel's deposition to their Motion In Limine. The Motion contained only the attorney's broad allegations and complaints about unfounded testimony and did not include any specifically identified theory or method, and didn't include any medical citations or affidavits. Plaintiff filed a written Response to the Motion [6b-10b] which included several mainstream literature references in support. At the hearing, Oakwood specifically identified that their alleged dispute was over "whether the use of oxytocin (Pitocin) can cause a traumatic head injury against mother's anatomy." [17a, lines 21-25]

This alleged dispute over the assertion that Pitocin can cause a closed head injury or traumatic fetal head injury against mother's anatomy was and is a waste of time. By reading the defense experts' and defendant's trial testimony, cited and quoted *infra*, it will become clear that the unanimous consensus, of even the most hostile of

defense expert witnesses, was that Pitocin can and does cause closed head injuries.

Importantly, Oakwood stated on the record that he had not read Plaintiff's Response to the Motion. [21a, lines 2-4] The Plaintiff's Response cited and quoted from well known literature in support, such as the PDR and the AMA, and, arguendo, established that there was no legitimate dispute and that there was <sup>no</sup> novel evidence. Importantly, the lower court, following discussion with Oakwood's counsel on the record, granted his request to file additional pleadings on the Davis-Frye issue [20a-21a]. She explained that she was only providing her ruling "today" on Oakwood's Motion To Exclude Testimony From Ronald Gabriel, M.D. [21a, line 7-8] No Order was ever proposed or entered in the lower court denying a Davis-Frye hearing. This is because Oakwood abandoned the entire closed head injury theory general challenge, never objected to the theory again during pretrial or during trial, never filed the requested additional pleadings, never raised the issue again. Oakwood chose to not file additional pleadings, to not present oral argument further, and instead to abandon this specious issue. Instead of blowing the horn on Dr. Gabriel, Oakwood is merely blowing hot air - a lot of it.

In terms of the facts in evidence issue, in this case the facts in evidence are uncontested that plaintiff's mother received six and one half hours (6 and ½ hours) of non-stop intravenous Pitocin (oxytocin) administration which was inappropriate and excessive. Plaintiff's expert obstetrician Dr. Paul Gatewood provided a detailed reading of the medical records which revealed excessive and inappropriate Pitocin administration and testified to the deviations from the standard of care. [111b-112b, 172a, 180a-187a, 188a, 190a, 193a, 194a, 200a-202a, 205a, 113b, 115b-117b, 123b, 126b-130b, 131b-132b, 209a-210a, 139b-144b, 146b, 492a, 147b, 149b-151b, 152b]

It is uncontested that the drug oxytocin, in this case under the trade name Pitocin, inter alia, stimulates and enhances uterine smooth muscle contractions, and has well known and universally established potential fetal complications arising therefrom. Plaintiff's obstetrical expert Paul Gatewood, M.D. described the complications of inappropriate and excessive use of Pitocin on the uterus and the blood supply to the fetus: "Whenever Pitocin is

used, and the uterus contracts with or without Pitocin, what happens is the blood supply coming to the placenta from the uterus is shut down and if it's overstimulated it shut off...that shuts down the blood...where it's hyper-stimulated, it over contracts or contracted too long without adequate resting between contractions, then you have a period of time where you're not getting any oxygen to the placenta and, therefore, out to the baby." [108b] (See Footnote 10, infra)

At 236a-237a, Plaintiff's expert pediatric neurologist Dr. Ronald Gabriel clearly and carefully explained three (3) mechanisms of brain injury under the influence of Pitocin, including "less blood flow from the placenta," exactly as explained by Dr. Gatewood. Dr. Gabriel stated that the contractions in this case caused injury to the fetal brain as follows through the following mechanisms:

- (1) "Direct pressure...producing excessive pressure on the skull and that produces direct trauma;"
- (2) "Elevations in venous pressure in the fetal head and cause lack of blood flow to the fetal brain;" and
- (3) "Clamp down the uterus, reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta, producing reduced flow to the fetal brain." [236a-237a]

The fetal-uterine monitoring records are medical records which immediately after birth were noted in the record by the nurse (in a portion of the record omitted by Oakwood in their Brief or Appendix) to have been "sent to [the] Medical Records" department and, hence, made part of the medical record at Oakwood Hospital itself.

[18b] The fetal-uterine monitoring records, as a powerfully probative evidentiary medical record, also made it uncontested that there were hours of fetal decelerations with contractions after the Pitocin was started in this case.

[23b-88b] It was also NOT contested by either of the obstetrical defendants that these decelerations were indicative of head compression and fetal blood supply compression, and were sometimes referred to as either "early" or "variable" decelerations. The hours of decelerations worsened over time, eventually reaching a hopeless crescendo of repeatedly severe decelerations which lasted over 30 minutes. These are facts in evidence which made it clear that the Pitocin administered to Ms. Craig caused repeated bouts of fetal head compression and caused there to be non-relaxed prolonged uterine pressures and abnormal contractions exerting

direct pressure on the uterine contents which included the fetal blood supply and the fetal head.

Admissions and other supportive testimony from both defendant Kittur and defendant Gennaoui are summarized, *infra*. The mechanisms involving both head compression and the reduction of blood flow to the fetus in this case were provided by both plaintiff's obstetrical expert Paul Gatewood, M.D., and plaintiff's pediatric neurology expert Ronald Gabriel, M.D. The diminished blood flow to the fetus mechanism testimony was based upon reading the actual fetal-uterine monitoring recordings and other hospital records, and was testified to by both plaintiff's obstetrical experts Paul Gatewood, M.D. [209a, lines 4-22: "Each time that happened that reduced blood supply to the baby. Because of, number one, the contraction causes reduced blood supply to the placenta as we discussed from the vessels. And secondly, the blood helps supply and it was going as oxygenated blood supply that was coming from the, it was compromised because of the cord being depressed. So those together resulted in decreased oxygen, so that's what we call hypoxia. And that's one of the major things as an obstetrician we endeavor not to have happen. And as a result of the hypoxia as an obstetrician we know that this has an apparent or abnormal or deleterious effects on babies particularly in the nervous system. " placenta and cord compression"]; [143b-145b: Dr. Gatewood testified to the proximate causes of the "reduced blood flow...reduced oxygen"]; [ 492a: "When the uterus clamps down the blood flow to the fetus is reduced"], and by plaintiff's pediatric neurology expert Ronald Gabriel, M.D. who sometimes referred to reduced blood flow as ischemia or reduced "profusion" [ 246a, lines 8-10: Dr. Gabriel expresses that there was "No global hypoxia-ischemia" but continues that there *was* "localized ischemia in the watershed regions because of reduced profusion;"]; [237a, lines 10-13: "Pitocin will clamp down the uterus reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta producing reduced flow to the fetal brain."]; [164b-165b: "the vascular component, that is to say the reduced blood flow"]; [199b, lines 9-11: Not the absence of oxygen, "but the reduction of blood flow which leads to reduction in oxygenation of the tissues."].

The fact that reduced blood flow to the fetus from the cord or placenta caused reduced oxygen to the

fetus is self evident since a fetus acquires oxygen from the mother's blood, and not by breathing, but was also provided in testimony by both experts Dr. Ronald Gabriel [198b-199b, lines 25,1: "Reduced blood flow and because the blood flow is reduced that reduced oxygen in delivery;" lines 6-11: the damage is caused by "...the reduction of blood flow which leads to reduction in oxygenation of the tissues"] [199a,lines 19-22: explains a study which used Pitocin to reduce blood flow, focused on and induced "ischemia," not trauma, to cause cerebral palsy in fetal animals] and by Dr. Paul Gatewood who sometimes referred to it as "hypoxia." [143b-145b: testified to the proximate causes of the "reduced blood flow...reduced oxygen"; [188b: remarking on the fetal-uterine monitoring recording of severe repeated decelerations: "persistent continuing decrease, of decreased oxygen supply to the baby...what you call hypoxia, or decreased oxygen..."]

Additionally, as a separate but Pitocin-related mechanism of injury, Dr. Gennaoui agreed that the fetal-uterine monitoring recorded evidence of repeated decelerations up until to the cessation of Pitocin at 6:00 p.m. and that the decelerations were severe and significant for head compression, and like Dr. Gabriel and other experts (e.g. defense obstetrical expert Dr. Ziegelman), referred to the significance of the decelerations as not only indicative of reduced blood flow, but also evidence of and indicative of "head compression." [(Gennaoui) 206b, lines 15-20: Early decelerations...the significance of them they are head compression as far as the baby is concerned]; [(Gennaoui) 88a: "An early deceleration was noticed and Pitocin was discontinued."]; [(Gennaoui) 286a: Oxygen was administered, Pitocin was stopped, because of the presence of early decelerations; 289a: Early decelerations have to do with head compression]; [(Gabriel)192b, lines 20-21: "these decelerations to me indicate head compression as well as compromising perfusion"]; [(Gabriel) 235a: "compression trauma"]; [(Gabriel) 199b: "trauma plus diminished blood flow"]; <sup>1, 2, 3</sup>; [(Ziegelman) 268b, lines 6-7: "as the head comes

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<sup>1</sup> Even Dr. Humberto Bernal, M.D., who was a third year obstetrical resident at the time of plaintiff's labor, testified that decelerations indicated head compression [235b] and that if the mother had hypertonus or prolonged contractions, there would be decelerations [233b]; Further, defendant Dr. Gennaoui admitted that the early deceleration was "something significant for head compression" and that they are "caused by head compression."

down and gets compressed, so it's manipulation of the fetal head;" lines 9-13: "variable decelerations can be caused by fetal head compression"; 269b, lines 6-12: "head pressure can cause variable decelerations" and at 268b, lines 10-11, line 18: he admitted that he saw "significant" and "severe" variable decelerations; and at 269b: Dr. Zielgelman admitted that fetal-uterine monitoring recording panels 904, 905, 906, 907 and 908 all display "severe variable decelerations." ]

Anatomically, Dr. Gatewood referred to the fetal head "coming through the boney pelvis." [131b] Dr. Gabriel used a similar term, "the pelvic outlet" [256a, lines 6-15] , which he described as the maternal "boney frame" through which the uterine contractions moved the fetus, head first. <sup>4</sup> [258a, 203b]

The brain injury testimony from a plaintiff's witness was based entirely on facts in evidence through testimony provided by Dr. Gabriel. [154b, 156b-157b, 167b--171b, 174b, 177b-181b, 184b-194b, 246a, 254a, 195b-199b, 256a, 258a, 200b-204b ]

Oakwood has omitted huge portions of the facts in evidence at trial, as well as testimony, in order to create a false impression. The recorded newborn examination performed by the observation nurse was not normal and the elevated respiratory rate (tachypnea) was recorded to have continued unchanged, the newborn hospital photograph is not normal, and for some reason, no physician examined this baby until the third day of his

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[206b, 289a]

<sup>2</sup> Defense expert Steven Donn, M.D., director of Neonatology at U. of M., corroborated the "two potential mechanisms through which injury may come about" which he stated as "trauma and hypoxia" and further explained as "trauma from excessive contractions of the uterus. There may be hypoxia by having a decreased amount of blood flowing to the fetus." [287b]

<sup>3</sup> Given the aforementioned quotes and citations, Oakwood's Brief, at p. 14, line (3)(a) engages in rank misrepresentation to this Court by saying that Dr. Gabriel testified to: "fetal head trauma and not hypoxia."

<sup>4</sup> Dr. Gabriel corrected defense counsel and insisted on calling it the "Pelvic outlet." (256a, lines 6-15). The boney pelvis/outlet through which the fetal must go is basic human anatomy.

life, and even this solitary recorded exam was limited.

Virginia S. Nelson, M.D., then Chief of the Pediatric and Adolescent Rehabilitation Service at the University of Michigan, testified at trial via video as to Antonio's diagnosis of "cerebral palsy" [(page 19, line 9)]. Dr. Nelson is an expert on Cerebral Palsy and described cerebral palsy as indicative of a brain damaging event: **"a nonprogressive lesion of the brain" which is "not changing. It happens, it's done, and it leaves whatever effects it leaves."** [104b]

Like an Ostrich who has placed its head in the sand in hopes of avoiding being seen, Oakwood's Brief has completely omitted the following critical records, all admitted into evidence without objection, all providing support for plaintiff's case, all "facts in evidence:"

- (1) The continuous fetal-uterine monitoring recordings [23b - 88b]
- (2) Continuation of the Nursing Notes [18b]
- (3) Post-delivery 7:45 p.m. newborn nursing examination-note in the Observation Nursery's Nursing Notes [19b]
- (4) The Newborn Hospital Photograph [20b-21b]<sup>5</sup>
- (5) Brain MRI consultation from University of Michigan Dept. Of Radiology [22b].

Relevant portions of testimony was also excluded. Oakwood is attempting to twist an age-old philosophical argument, in a not so subtle fashion: that if a tree falls in the forest, and there is no document in Oakwood's Appendix which documents that the tree fell, then the tree never fell. As will become clear to this Court, once all of the actual facts in evidence are reviewed, there will be no legitimate issue of law remaining here beyond Oakwood's false depiction of this case and this mother's injurious labor and this child's tragic nativity.

## **II. COUNTER-STATEMENT OF FACTS**

In its Brief and Appendix on Appeal, as well as within the trial court, in front of the jury and the Court of

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<sup>5</sup> Each counsel for Oakwood stated on the record that each had no objections to the photograph's admission into evidence. [174b-175b]

Appeals, Oakwood's approach has been to just disavow the existence of the truth - not to meaningfully or honestly address it. Oakwood's Brief begins by stating that the medical records in this case describe a "normal labor and delivery of a healthy baby." (Appellant's Brief, page 1) That line should be followed by: "Pay no attention to the man behind the curtain."

Ms. Craig was a full term pregnant woman whose membranes had spontaneously ruptured with clear fluid at 5:30 a.m [23b] on July 16, 1980 and she, along with the infant's father, immediately came to defendant Oakwood Hospital's labor and delivery for admission.

Initially, attending obstetrician Dr. Kittur undertook care. Dr. Kittur noted an exam with his resident at 5:50 a.m. [84a], the resident made a "6 a.m. admit note" [85a] and Dr. Kittur also noted his own examination at 8:45 a.m. on the labor record [84a], and wrote an order for an external monitor. Dr. Kittur wrote an order for a "K.O." (keep open) I.V. of Ringers Lactate ("RL") [87a], which was attached to the patient as noted at 10:00 a.m. [83a] [87a].

A fetal-uterine monitor was attached at 9:30 a.m. [83a] Two hours before being "augmented" with Pitocin (oxytocin), the fetal-uterine monitor recordings [23b-88b] revealed that Ms. Craig was in labor, with obvious spontaneous uterine contractions. A pattern of uterine contractions was nicely displayed beginning with a prominent contraction at the first page, panel 39353-39354 [23b], and continuing on to three separate contractions shown on 24b between panels 39354-39357. According to defense obstetrical experts and defendant Gennaoui's labor and delivery dictation [88a "contractions were felt"] and plaintiff's expert witness all examining the same records, including the fetal-uterine monitoring records, Ms. Craig was indeed in labor on admission (Dombrowski, 243b, lines 11-15 "she was in labor on admission.") (Gatewood, 201a-202a) (Ziegelman, "early labor," 256b, lines 15-16). Dr. Dombrowski even acknowledged that by testifying that the Pitocin use in this case was probably an augmentation of pre-existing labor, and that she was probably in labor, he was disagreeing with the attending physician's assessment, because "her attending physician obviously thought she wasn't" in labor.



(244b, lines 8-13)

However, at 10:00 a.m. an erroneous conclusion was reached. A nurse noted the erroneous conclusion in the Nurses Notes that there were No Contractions: "Contr None" [17b] [83a] The Delivery Record also memorializes the same erroneous conclusion by stating that "Onset of Labor" was "noon." [89b]

After this erroneous conclusion of no contractions, Defendant attending obstetrician Dr. Gennaoui took over Ms. Craig's care and ordered that Pitocin be started in this case. [87a] Given the fact that Ms. Craig was already in labor, this was done to "augment" labor, and, given the fact that there is no recorded examination of Ms. Craig after 8:45 a.m. until 2:30 p.m., there is certainly no recorded examination providing a clinical indication for augmentation with Pitocin.<sup>6</sup>

There was one order for Pitocin in the record. It was ordered by Dr. Gennaoui to be placed in an I.V. of "L.R." (Lactated Ringers) [87a] [15b], and the Pitocin was started at 11:35 a.m. [89a] A rate for this infusion was not stated in Dr. Gennaoui's order. The Pitocin dosage rate was recorded as increased by the nursing staff, by increments of 2 milli-units per minute, from 2 milli-units at 11:35 a.m., up to 18 milli-units per minute by 3:25 p.m. where it remained until being shut off at 6:00 p.m. [89a] Excessive Pitocin administration was a fact in evidence arising out of a plain reading of the medical records. A two-bag I.V. set-up with each bag containing Pitocin, from two different nurses, was completely contained in hospital records, which are facts in evidence, and will be presented in a sequence of five (5) steps, as they were succinctly demonstrated for the jury at trial. Oakwood admits in their Brief that there was Pitocin in the D5W I.V. which was given to the patient (Oakwood's Brief, p. 30, footnote 25). It is uncontested that there was no order for D5W (5%D/W) solution, no order for Pitocin to be placed in a "D5W" solution, and no order for an I.V. piggy back ("IVPB") set-up or a two solution set-up at all.

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<sup>6</sup>The dictated delivery note by Dr. Gennaoui states that "pelvic findings were the same" at 11:30 a.m. when the Pitocin was started [88a] but the place where the vaginal exams are noted didn't show it [84a] and the fetal-uterine monitor recordings didn't note it or reveal it either.

There is more than one entry in the medical record that proves that Pitocin was also placed into the lactated ringers (RL) solution.

(1) The 5 steps: The first of four (4) important Pitocin pages is 87a, which represents the physician's orders. Dr. Kittur wrote the order for a K.O. (keep open) RL (Ringers Lactate) I.V. 87a shows that nurse J. Gyra signed off the order for 1000cc of RL (Ringers Lactate). Nurse Gyra also noted the act of establishing the Ringers Lactate (RL) I.V. in the right hand in the nursing notes on 83a. Her act was step one (1). It is uncontested that Dr. Gennaoui took over later that morning, and that he wrote an order for 10 units (**one amp**) of Pitocin to be placed in 1000cc of the **D5LR**. (Lactated Ringers or Ringers Lactate). [87a] His act was step two (2).

Importantly, the Pitocin order is signed off by a different nurse, a second nurse, who was nurse K. Quinlan, and nurse Quinlan's signature indicated that she placed Pitocin into the liter bag of lactated ringers (LR). [87a] Her act was step three (3) It is apparently Oakwood's argument now that this event never happened. Oakwood is still desperately arguing that nurse K. Quinlan never placed Pitocin into the LR - even though the order was written for it, and even though she signed off on the order with her unmistakably prominent signature. [87a] According to the defense's own nursing testimony, that of Oakwood nurse Rhea Hill, R.N., by signing off the order, nurse Quinlan would have been the person completing the order as written and placing the Pitocin into the D5LR. [253b] Nurse Hill, whose writing appears in two early morning notes on 83a, stated at trial that "you would expect the person that did the task or followed the order to sign off the order." [253b] This confirmed further that the signature of nurse K. Quinlan, R.N. in following the order was more than substantial evidence that nurse K. Quinlan would have personally placed the Pitocin into the ordered LR.

83a contains a nursing note, written by nurse Gyra (or spelled ?Tyra), which indicates that nurse Gyra created a second Pitocin infusion which was mixed in a "D5W" solution. Her act was Step four (4). This was a type of IV Pitocin solution not ordered.

83a also indicates that nurse Gyra then took the D5W Pitocin solution and created a piggy-back arrangement with the existing lactated ringers (RL) solution, for which there is no order, using the 1000cc of “D5W” with one amp of Pitocin added. The creation of a piggy-back arrangement by nurse Gyra was Step five (5) - the nightmare which is contained right in the Oakwood medical records.

Hence, nurse Gyra connected the second bag containing Pitocin, this one in D5W, to an I.V. set-up of LR that already had Pitocin. The facts in evidence thus proved that there were two nurses each placing Pitocin into two different bags connected to each other and flowing into the patient simultaneously - a 2 bag set-up called an intravenous “piggy-back” set-up or “IVPB.” Nurse Gyra took the un-ordered D5W Pitocin solution and created this documented “IVPB” type of arrangement, which means it was piggy backed or injected into the other pre-existing IV. Again, Oakwood admits that this IVPB two bag arrangement took place, which was not ordered. Defendant Gennaoui stated at trial that nurse Gyra made a mistake by placing the Pitocin in a solution of D5W [210b, 263a]<sup>7, 8</sup>

Finally, Oakwood’s Appendix, at page 90a, is a bit illegible at the bottom so plaintiff has included a clearer copy. <sup>13</sup> [4b] At the bottom, there is a note which documents that at about 7:45 p.m., Ms. Craig arrived in the Recovery Room with an I.V. of “D5RL” (Ringers Lactate) containing “two ampules of Pitocin infusing well right hand with 200 cc remaining.” Defense expert obstetrician Seymour Ziegelman, M.D., testified and explained this as meaning that 800 cc’s of this solution “had gone into the patient over nine hours” [257b, lines 13-14; 258b, lines 10-13] It is uncontested that there is no Order for two Ampules of Pitocin but, more importantly, this Recovery

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<sup>7</sup> The defendant Oakwood Hospital came up with a desperate notion that the nurses would each have manually placed a brightly colored sticker on the I.V. bags denoting it as having Pitocin. For example, they had former obstetrics third year resident (in 1980) Humberto Bernal, M.D. testify that “they *usually* have a label.” Vol. 16, page 28, line 22.

<sup>8</sup> Page 89(a) of Oakwood’s Appendix is materially unclear in one important aspect. It reads as if it says “TYPE” SOLUTION (See the blow-up at 14b) instead of the original which said “IVPB” SOLUTION.[11b, 12b] 11b states that the IVPB Solution with Pitocin was “R/L” (Ringers Lactate) and began at a rate of 2 m.u. at 11:35 a.m.

Room record provides additional "facts in evidence" that there was Pitocin in the lactated ringers (LR) I.V. which was infusing into the patient's right hand, and therefore again corroborates the presence of Pitocin in the lactated ringers (RL) I.V.

Defense obstetrical witness Seymour Ziegelman, M.D. also testified that use of Pitocin in this case was for the "augmentation" of labor, and he testified that with augmentation, you are supposed to use "less Pitocin" 259b, lines 5-7; he testified that if labor is progressing, albeit slowly, with augmentation, oxytocin should not be used [260b, line 19]. Further, as labor progresses, the dosage required of Pitocin often decreases, according to Dr. Ziegelman. [261b, lines 19-21] Yet, the dosage of Pitocin was never lowered in this case until it had to be shut off emergently, too late, at 6 p.m. [89a] - after two hours and 35 minutes of 18 milliunits per minutes, and after six and one half (6 ½) total continuous hours of Pitocin! <sup>9</sup>

Contractions were listed by nurses as "mod" meaning moderate and "q2" or "q3" or "q4" meaning every 2 or 3 or 4 minutes, yet the Pitocin was increased again at 12:50 p.m., 1:20 p.m., at 1:40, at 2:30 p.m., at 2:55 p.m. and at 3:25 p.m. [89a] Defendant Dr. Kittur testified that if and when there are moderate contractions every 2 to 3 minutes, it would have been a deviation from the standard of care in 1980 to further increase the Pitocin infusion rate. [297b, at 181-182, lines 20-25, 1-3]

An internal fetal monitor was placed at 2:30 p.m., and thereafter hours of continuous fetal heart/uterine pressure monitoring recording strips exist as facts in evidence, and were read by defense and plaintiff witnesses, including the defendants, as displaying marked abnormalities including uterine hyper-stimulation, fetal head compression and blood supply compression coinciding with the uterine contractions.

Viewing the monitor strips, Defendant Gennaoui admitted that an early deceleration is significant for fetal

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<sup>9</sup> "One characteristic of intravenous oxytocin is that when successful, it usually acts promptly, leading to noticeable progress with little delay. Therefore, the drug need not be used for an indefinite period of time to stimulate labor. **It should be employed for no more than a few hours...**" *Williams Obstetrics*, 20<sup>th</sup> Edition, page 428 (1997)[emphasis added].

head compression [206b] and that early decelerations took place in this case and that the Pitocin was finally shut off because of "repeating decelerations" [207b]. He identified early and variable decelerations [vol. 14, page 149] and admitted that variable decelerations "are an objective sign of cord compression." [211b, lines 21-23] Dr. Gennaoui admitted that the uterine contraction/fetal heart monitor recordings *would* indeed indicate whether the fetus was not tolerating contractions which were either "too strong or last too long" by indicating that "the heartbeat would slow down" and he admitted that the monitor recordings displayed this pattern over time during the mother's labor in this case [207b, 271a] Dr. Gennaoui admitted that during the administration of Pitocin, continuous monitoring of fetal heart rate and uterine contractions was mandatory in 1980 [213b] and represented the standard of care in 1980, and then he admitted that there was "no monitoring from 1:10 p.m. to 2:00 p.m." while Pitocin was being given in this case. [214b-215b]

A documented attempted fetal resuscitation took place with high volume oxygen by mask at or about six o'clock p.m. Dr. Gennaoui admitted that around the time that he stopped the Pitocin, he began seven (7) liters per minute of Oxygen by mask to the mother (page 124)[18b] because of the presence of repeated early decelerations [286a], a type of deceleration he had already testified to as significant for fetal head compression. [206b] Dr. Gennaoui also admitted to the existence of repeated severe variable decelerations of the fetal heart rate[102b] [227b] with every uterine contraction in panels 904, 905 and 906 of the fetal heart/uterine contraction monitor recordings [85b, 86b, 87b] which to Dr. Gennaoui indicated "the decrease of oxygen to the fetus." [227b] Dr. Gennaoui admitted that severe variable decelerations were "significant to fetal well being...because by definition variable deceleration is related to cord compression and the more severe the decelerations, that means the more cord compression is existing." [226b, lines 17-24]

The dictated delivery note [88a] was misleading in that it curtly stated that "an early deceleration was noticed and Pitocin was discontinued" as if to imply the existence of only one deceleration. The records show that Pitocin was stopped at about 6:00 p.m. [89a], which was at or about Panel 98902, and yet, the patient's fetal-

uterine monitoring records, which are facts in evidence, make it clear that the repeated decelerations began, according to, for example, testimony from defendant Dr. Kittur, at least as early as panel 98853 which was about 2:44 p.m., since panel 98849.5 is 2:30 p.m. when the internal monitor is shown to have been exactly placed, and according to, for example, defendant Dr. Gennaoui, repeated decelerations began at least as early as panel 98880, which was 4:32 p.m., growing in severity until bottoming out to 30 beats per minute at 98900, which was at about 5:52 p.m. - still 8 full minutes before the Pitocin was stopped! [Kittur 300b-310b] [Gennaoui 98b,317b-339b, 99b]

To see a laboring woman, inside a modern American city teaching hospital, where the people responsible for this obstetrical patient and fetus somehow failed to notice or react to repeated and worsening ominous and obvious decelerations over the course of hours, decelerations which were eventually occurring with each contraction, is chilling. But it happened. It's right there in the Oakwood hospital records - though Oakwood would prefer you not look at them and not know about them.

Oakwood not only completely omitted from their Brief and Appendix the fetal-uterine monitor strips [23b-88b], completely omitted the continuing nurse's notes on the labor [18b], but also completely omitted significant post-delivery facts in evidence including the observation nursery's initial nursing examination of the newborn, [18b] newborn hospital photograph, [20b-21b] and University of Michigan's brain MRI consultation report. [22b] The initial nursing newborn examination [19b] documented tachycardia (HR 160), tachypnea (RR 64), "black" skin which later became "clear" [92a], a "large umbilical cord," and, importantly, the presence of "molding" of the head. [18b] Molding, according to defense obstetrical expert Dr. Dombrowski, is indicative of the baby being "traumatized coming through the birth canal." [249b] [251b,line 2, 9-12)] The photograph [20b-21b] was examined by neonatologist defense expert Dr. Donn at trial who testified that it did reveal a molding pattern "over the whole surface of the forehead starting above the eyebrows" [312b, lines 14-16, 17-18] Dr. Donn stated that the forehead molding pattern was caused by the birth canal on the head as it passes through. [312b, lines 21-22] Dr.

Donn described the birth canal is a “bony skeleton and muscle.” [312b, line 25] He admitted that with a brow presentation, depending on the amount of time spent in contact with the birth canal, one can see this molding of the forehead, and that if Antonio had spent a few hours in a brow presentation, he could look like Antonio’s molding pattern in the photograph. [313b, lines 5-18] The photograph, which was in color at trial, also displayed edema, redness, and bruising, in addition to molding. Further, the photograph revealed neurologically significant abnormalities indicative of acute brain injury including extreme right lateral eye deviation and a left sided “cortical thumb.” [169b-175b]

Oakwood hopes this court simply reads the dictated delivery note [88a] and pays no attention to the actual moment to moment recordings of this fetus and uterus known as the fetal heart monitor strips/uterine pressure recordings. The strips are part of the medical records, just like EKG’s, X-rays or other monitoring paper work generated during any hospitalization. The monitoring recordings are kept in the regular course of obstetrics, were the recordings from which observations and other records were made, and are in and of themselves sufficiently powerful evidence to uphold the verdict in this case.

In fact, which is more accurate? The dictated delivery note [88a] alleging the existence of “an early deceleration”, the intravenous induction record allegedly kept from 11:35 a.m. to 5:30 p.m. [89a] which fails to reference any deceleration, or the actual continuous fetal -uterine monitor recordings [23b-88b] , omitted from Oakwood’s Brief and Appendix, which all obstetrical witnesses, including the defendants, relied upon and agreed displayed repeated and severe decelerations? The Oakwood records including the monitoring records were admitted without objection. The most accurate moment to moment medical record of fetal well-being and the activity of the uterus was staring each Oakwood employee, each testifying witness and each juror right in the face: nine (9) hours of fetal and uterine recordings.

Viewing the continuous fetal-uterine monitoring recordings, Dr. Gennaoui admitted to contractions lasting 3 minutes which is abnormally long (over one minute is abnormally long) [225b] and called it “coupling” of

contractions; he agreed that the reason the fetus needs a one minute or more resting period between contractions is because of the need for oxygen [223b]; he admitted that severe variable decelerations of the fetal heart rate are “significant to fetal well-being” [226b, lines 17-23] and indicate the decrease of oxygen to the fetus [227b]; he admitted to the existence of severe variable decelerations on the monitor strips [227b]; he admitted that he stopped the Pitocin because of the “persistence of the deceleration [230b]; he admitted that uterine contractions must be observed continually and the flow of Pitocin must be shut off immediately if a uterine contraction exceeds 1 minute in duration or if the fetal heart rate decelerates significantly. [231b-232b, lines 4-6]

The facts in evidence make out not just a plausible case, but an overwhelmingly convincing prima facie case. Plaintiff’s causation expert, pediatric neurologist Ronald Gabriel, M.D., testified that plaintiff’s brain injury was caused by a “traumatic component as well as a vascular component.” [164b-165b] He explained the interchangeable connection between lack of blood flow and lack of oxygen (hypoxia) in the fetus in saying that there was “Reduced blood flow and because the blood flow is reduced that reduces the oxygen in delivery.” (198b-199b)<sup>10</sup>

Oakwood has completely omitted Dr. Gabriel’s testimony concerning reduction of blood flow to the fetus mechanism of injury from their Brief and Appendix. [237a, lines 9-13] He testified to it, and it matches exactly Dr. Gatewood’s testimony where he spoke about compression of the fetal blood supply and hypoxia. As a pediatric neurologist and pediatrician, Dr. Gabriel identified reducing blood flow to the fetus and to the fetal brain as causal mechanisms of injury in explaining at trial all the mechanisms for the effects of Pitocin. [236a-237a, lines 9-13] Hence, Dr. Gatewood’s testimony which at times discussed “hypoxia” and Dr. Gabriel’s testimony which referred to “reduced blood flow” or “reduced perfusion” is referring to the same mechanism of reduction of oxygenated

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<sup>10</sup> Dr. Gatewood and several other witnesses utilized the word hypoxia arising from ischemia but were referring to the same phenomena - it’s just semantics since fetuses don’t breath. Lack of blood flow (ischemia) to the fetus or brain means that oxygen didn’t flow (hypoxia) to the fetus or brain as well.



blood flow to fetus and to fetal brain. Often, this is referred to as “hypoxia-ischemia.” Further, Dr. Gatewood made it clear he was not testifying to the cause of the brain injury, and deferred to a pediatric neurologist. [193a]

Hence, together Dr. Gabriel's and Dr. Gatewood's testimony was entirely logical and consistent, and based on the facts in evidence, established that the negligent use of Pitocin was a cause-in-fact and a proximate cause for plaintiff's brain damage, and is more than enough to sustain this verdict on appeal.

Based on the extensive facts in evidence, Dr. Gabriel agreed that in his opinion in this case there was, in addition to diminished blood flow, the existence of trauma: **“trauma plus diminished blood flow.”** [199b] These are exactly the potential mechanisms established by Defense causation expert neonatologist Steven Donn, M.D., who testified that the mechanisms by which Pitocin can harm a fetus are two-fold and “include **trauma and hypoxia**. There may be trauma from excessive contractions to the uterus. There may be hypoxia by having a decreased amount in the blood flowing to the fetus.” [315b, lines 8-15] Hence, Dr. Donn further endorsed how the word “hypoxia” refers to the lack of blood flow to the fetus.

Defendant Doctor Kittur admitted during his trial testimony that induced uterine hyper-motility by oxytocin (Pitocin) can cause permanent brain damage in the infant [310b, lines 5-9] and defense expert obstetrician Mitchell Dombrowski, M.D. admitted that Pitocin can cause trauma to a fetus [239b, lines 1-5], can damage fetuses, [238b, line 25] and that the resistance of the birth canal to the descent of the fetal head may cause intracranial trauma. [(242b, lines 19-23)]

Standard of care defense testimony in this case also came from obstetrician Mitchell Dombrowski, M.D., who testified unequivocally that according to the standard of care as of 1980, induction of labor should not be attempted in cases of unengaged fetal head. [240b, lines 8-16]. Defense standard of care obstetrical expert Seymour Ziegelman, M.D. testified that nonetheless, when Pitocin was started in this case, Ms. Craig was carrying a fetus with an unengaged head [263b, lines 20-23] and further agreed that Pitocin ran for five hours and 45

minutes in this case with an unengaged head. [262b, lines 11-13] Defendant Dr. Gennaoui admitted this as well. [219b, line 13-15] Hence, Pitocin should not have been used at all - even according to the testimony of defendant and the defense standard of care experts! <sup>11</sup>

Directly utilizing the hospital records, Dr. Gatewood testified in great detail about the inappropriate and excessive Pitocin administration. [107b-109b; 110b-113b (deviations), 171a, 175a, 188a, 190a-194a, 113b-114b, 116b, 130b, 117b-120b, 121b-125b, 133b-134b, 135b, 136b] The medical records themselves make it quite clear that two nurses, not one, each placed Pitocin into an I.V. solution that went into the patient. Following the exact sequence from the hospital record itself, Dr. Gatewood went through a demonstration set-up displaying exactly how Pitocin had been set-up and how wrongfully and negligently the Pitocin had ended up in both I.V. solutions running into the patient, and that this was a deviation from the standard of care. [188a, 190a] Defense expert Seymour Ziegelman, M.D. also admitted that any dual Pitocin set-up would be a deviation from the standard of care. [266b-267b]

(2) An attempted fetal resuscitation took place at 98902.25 (1/4th) according to the "O2" note (oxygen) on the monitoring strip, [85b] which corresponds to 5:58 p.m. This is also recorded in the continuation of the Nurse's Notes which was also omitted from Oakwood's Brief or Appendix. [18b] [Also on 85b] Due to the repeated severe decelerations in the fetus, an attempted resuscitation of the fetus was attempted through the mother who was given oxygen by mask at 7 liters per minute [18b] until delivery which took place 53 minutes later at 6:51 p.m. The Nurse's Notes also refer to the fact that "decelerations" were noted. As can be seen from the fetal-uterine monitoring recordings, the repeated decelerations had been going on for a very long time before the oxygen was given and the Pitocin was belatedly stopped.

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<sup>11</sup>For example, "The administration of oxytocin by any route with the head not engaged should be condemned." J.F. Jewitt, M.D., *Induction of Labor and Amniotic Fluid Infusion*, The New England Journal of Medicine, Massachusetts Medical Society, Committee on Maternal Welfare, p. 548-9, (March 4, 1976).

(3) The video trial testimony of defendant Oakwood obstetrician Ajit M. Kittur, M.D. was taken on January 3, 1997 and played at trial on May 13, 1997 [283b-311b] and was also completely omitted from Oakwood's Brief and Appendix. Dr. Kittur testified that the mother was given 50 mg of I.V. Demerol, a narcotic pain reliever, which to him suggested that the mother was "experiencing significant pain" at the time. [304b, at 256-257, lines 2-25, 1-25] He also testified that if and when there are moderate contractions every 2 to 3 minutes, it would be a deviation from the standard of care in 1980 to further increase the Pitocin infusion rate - contrary to what was done in this case. [297b, at 181-182, lines 20-25, 1-3] Testimony elicited from Dr. Kittur emphasized his reading of the fetal-uterine monitoring recordings. He stated that the external uterine pressure monitor can indeed show abnormalities of frequency and duration of the contraction. [288b-289b, at 31, lines 12-13] He defined "hyper-tonicity" of the uterus as an increase in the baseline pressure or resting pressure [289b, at 32, lines 7-11] and "hyper-contraction" as an increase in uterine contraction frequency. [289b, at 32, lines 11-13] He testified that there must be at least a 60 second interval of "resting tone" between contractions. [289b, at 33, lines 2-4, 6-7] He testified that a "tachycardia is a heart rate about 160 beats per minute" [291b, at 54, lines 11-12] and that a bradycardia "is a heart rate below 120, below 110 really, because some books mention 110 to 150 as the baseline." [291b, at 53, lines 22-25] He stated that Variable Decelerations are a "form of cord being compressed." [294b-295b, at 90, lines 4-5] Later in trial, defense obstetrical expert Seymour Ziegelman, M.D., testified that one of the things that can cause variable decelerations is fetal head compression [270b-271b, Lines 3-13, lines 11-12] and that it is also commonly caused by cord compression. [272b, lines 10] It was also established that Dr. Kittur's definition of a severe variable deceleration is when the fetal heart rate falls to 60 beats below baseline (e.g. from 130 to 70) or when it falls to an actual 60 beats per minute. [294b-295b, at 90, lines 16-20] The link between the decelerations, seen repeatedly on the actual fetal-uterine monitor recordings, and compression of the blood flow to the baby's brain (hypoxia-ischemia) and compression of the fetal head, was therefore well established by even the defendants and other defense witnesses.

(4) Although his testimony was completely excluded from Oakwood's Brief and Appendix, defendant Dr. Kittur testified that based upon the fetal-uterine monitoring recording, at one point the observers of the monitor were "up the creek." [304b-305b, at 262, lines 12-14] Dr. Kittur also made the following significant findings including repeated severe variable decelerations: Dr. Kittur stated that the baseline uterine pressure may have been elevated early on even at 39401 [299b, at 222], that there was less than a 30 second inter-contraction time at 39403 [299b, at 223], that at 39408 the strip ends at about 1:06 p.m. and that Part II begins again at 1:54 p.m. [300b, at 234]. Dr. Kittur thought that there could have been an "early variable deceleration" at 98853 [292b, at 75], variable decelerations at 98855 [292b, at 75, lines 14-17], two and part of a third deceleration at 98857 [292b ("variables")], more significant findings at 98858 and 98859 ("two variable decelerations noted with each of those contractions that are fully recorded") [292b, at 76], 98860 to 98861 ("variable deceleration"), 98864 (variable deceleration just before it) [292b, at 76], 98865 (variable deceleration)[292b, at 77], 98866 and 98867 (variable decelerations) [292b, at 77, lines 24-25], 98868 and 98869 (variable decelerations)[292b, at 78], 98872 (Two contractions, first one lasts about 3 minutes if it's a contraction)[304b, at 259], 98874 (two decelerations) [293b, at 81] ("So at this point in time the uterine contractions are not being adequately monitored as of this strip at 874?" "Yeah") [304b, at 261, lines 19-22](It could be tetany, might not be tetany...I couldn't say) 304b, at lines 7-18] ("once again when you don't know where the uterine contraction begin and ends, **you are up the creek**, you don't know") [304b-305b, at 262, lines 12-14], 98876 (variable decelerations) [293b, at 81, lines 17-21] (3 contractions seen, the first lasts over a minute, deceleration down to 90) [305b, at 263 and 265], 98880 ("variable decelerations with contractions returning to baseline just preceding the end of the uterine contraction") [293b, at 82, lines 7-10], 98882 (one variable deceleration, possibly one more) [293b, at 82, lines 14-24], 98884 ("same pattern continues, you have episodes of variable decelerations") [293b, at 83, lines 3-7], 98885 (variable deceleration) [293b, at 83, lines 11-14], 98889 (more variable decelerations) [293b, at 84, lines 4-5], 98890 (deceleration down to 80) [307b], 98891 (variable decelerations) [293b, at 84, lines 9-10], 98893 (variable

decelerations continue)[293b, at 84, line 17], 98895 (decelerations continue), 98896 (not sure when the contraction ends, deceleration lasts longer than the one before it “so there is a possible element of slow recovery”)[293b-294b, at 84-85, lines 21-25, 1-3], 98897 (“variable deceleration with recovery that occurred just before the contraction sets in again”)[293b-294b, at 85, lines 6-10], 98899 (“four episodes” of “variable deceleration with delayed recovery”)[293b-294b, at 85-86, lines 23-25, 1-4], 98902 (Notation on strips for Oxygen being started at 7 liters ) (oxygen is “probably given for severe variable decelerations that were recurrent”)[307b, at 279, lines 17-18], 98904 (“there is a drop” and variable decelerations)[294b, at 88, lines 20-25], 98905 (three variable decelerations with the contractions)[294b, at 89, lines 4-6] (variable decelerations are a form of cord being compressed)[294b-295b, at 90, lines 4-5], 98905 (identifies fetal heart rate dropping to 60 here in this strip meeting definition of severe decelerations)[294b-295b, at 90-91, lines 16-24, 1-3, 10-12] (three (3) severe variable decelerations directly corresponding to each uterine contraction)[293b, at 282].

(5) At trial, defendant Dr. Gennaoui examined the continuous fetal-uterine monitoring recordings [23b-88b]. He agreed that a baby needs at least one minute uterine rest between contractions “because of the need for oxygen.” [223b] Dr. Gennaoui admitted that the Pitocin had to be stopped at 6:00 p.m. because of repeated decelerations with uterine contractions, not just one, and said that the Pitocin was suddenly stopped “because of the persistence of the deceleration.” [271a, 209b)] He admitted that the documented “early deceleration” is something that is “significant for head compression.” [206b] He explained that early decelerations are caused by head compression. [289a] Therefore, Dr. Gennaoui linked the significant fetal-uterine strip findings to both head compression and reduced blood flow to the fetus.

(6) On the basis of the record, including the fetal-uterine monitoring recordings, Dr. Gennaoui also admitted at trial that the care delivered deviated in several ways, several times, from the standards of care. For example, one of several standard of care questions put to Dr. Gennaoui was whether “under all the circumstances that you’re aware of, specifically the review of the tracings, which we did today, in light of that and in light of those

same 64-66 minutes that we reviewed together with the jury, were there, indeed, deviations from the standard of care?" His answer was an unequivocal "yes." [222b] Defendant Gennaoui admitted that "the uterine contractions must be observed continually and the flow shut off immediately if they exceed one minute in duration or if the fetal heart rate decelerates significantly." [217b, 290a, lines 4-6] He admitted to only seconds taking place between contractions examined on 49b [224b], admitted to contractions lasting abnormally long [225b], admitted to seeing "coupling" of uterine contractions on the fetal-uterine monitoring strips [225b] and that a baby needs at least one minute or more resting period between contractions because of the need for oxygen. [223b] Dr. Gennaoui examined the strips and admitted to seeing severe variable decelerations with every contraction" [227b]. He admitted that in January, 1996, at his deposition, his reading of the fetal-uterine monitoring strips identified repeated severe decelerations. [229b]

(7) At deposition, on January 5, 1996, Dr. Gennaoui had testified to his actual reading of the fetal-uterine monitoring recordings, which were excluded in Oakwood's Brief and Appendix, and described a pattern of escalating decelerations beginning as early as 98874 (4:08 p.m.), increasing in frequency at 98880 (4:32 p.m.), and finally a pattern of repeated and persistent Severe Variable Decelerations with every contraction at 98899 [83b] (5:48 p.m.) and continuing until the strips end at about 6:28 p.m. before the delivery, which was at 6:51 p.m. [85a, 90a] Since panel numbers are four (4) minutes apart, and the internal fetal monitor was placed at 2:30 p.m. at panel 98849.5, we know that 98899 was about 198 minutes later at 5:48 p.m. The Pitocin wasn't stopped until 12 minutes later at 6:00 p.m. [89a]

The fetal-uterine monitoring strips speak for themselves - they are HORRIFIC and consistent with fetal brain injury exactly as described by plaintiff in this case. Defendant Gennaoui had stated that for a healthy baby one wants contractions that last no longer than 60 seconds [91b] and frequency of no less than one minute apart. [92b] He testified to the two causes of decelerations that he knew of, being either "head compression" or "cord compression." [90b] Dr. Gennaoui indicated that one could not tell if a contraction is at a resting point simply by

hand, [95b] addressing the need for uterine pressure monitoring. He acknowledged that if there is a slow return to baseline following a deceleration it indicates a decrease in the oxygen reserve of the fetus. [97b] He agreed that severe decelerations are negatively significant to fetal well-being [337b] and that the variable decelerations indicated "the decrease into the oxygenation to the fetus." [337b-338b] He saw decelerations on panels 98874 ("variable"), 98880 ("early"), 98882 ("variable could be late"), 98884 (variable), 98885, 98886 (down to 80 beats per minute) [322b], 98888 (variable down to 90) [324b], 98890 and 98891 (variables) with decreased variability after this panel for one to two minutes [328b], 98893 (variable), 98895 (drop to 60 beats per minute), 98896 (variable), 98897, 98898, 98899 ("Severe deceleration" and the next one has a "slow return to baseline") [332b, lines 19-21], 98900 (bottoms out below 30) [334b], then decelerations with every contraction [334b, lines 24-25], 98901 ("There is an increase in the tone in the way it's most...you see a sudden increase in the uterine activity, the intensity of contraction...") [335b, lines 6-10], 98902 (Severe) [336b], 98903 (Severe Variable) [337b], 98904, 5, 6, 7, 8 and 9 (Severe variable deceleration with every contraction) [338b-339b]. Looking at panel 98901, he also testified to increased uterine tone, a sudden increase in uterine activity, and increased intensity of contraction at the time of the severe decelerations. [335b, lines 6-10]

(8) At trial, Dr. Gennaoui admitted that the severe variable decelerations seen on the monitoring strips in this case are "significant to fetal well-being...because by definition variable deceleration is related to cord compression" and that severe variable decelerations indicate the decrease of oxygen to the fetus. [226b-227b]

(9) Dr. Gennaoui admitted at trial that the fetal-uterine monitoring strips demonstrated that Ms. Craig was "exquisitely sensitive to Pitocin at just **two**" milliunits per minute I.V. infusion rate [216b, line 14]; admitted that the infusion of Pitocin was supposed to have been maintained at the lowest possible infusion rate to allow adequate progression of labor [218b]; and then admitted that Pitocin was gradually increased over time to [a whopping] 18 milliunits per minute (nine times the rate at which Ms. Craig's uterus had already admittedly demonstrated exquisite sensitivity) without decrease, continuously for at least 2 and ½ hours. [218b]

(10) As stated, Dr. Gatewood went through and reviewed the continuous fetal-uterine monitor recordings at trial and demonstrated the rather obvious findings found therein as well. With respect to the uterine pressure recordings, one can see an obviously prolonged contraction with another following too closely at 98845 [55b]. The continuous external uterine pressure recording does permit the observer to view the relative proportional rise and fall of pressures, the absence of a rise or fall, the beginnings and ends of contractions, and the between-contraction state, or resting state if the uterus comes to rest. The monitor can discern whether a contraction has ended and indeed whether it has come back to the resting state. A non-relaxing or climbing baseline uterine pressure can be seen frequently in Antonio's pressure recordings which should have signaled a change in the Pitocin administration. [For example, without exclusion, at 57b, 60b, 61b, 62b, 65b, 66b, 67b, 68b 69b, 70b, 71b, 73b, 75b, 76b, 77b, 78b, 79b, 80b, 81b, 82b, 84b, 85b] Was any capable physician around who was actually looking at the fetal-uterine pressure recordings? The record would indicate in the negative. The Pitocin wasn't stopped until 6:00 p.m.[89a] which was panel 98902. [84b] (Clocked by using the internal fetal electrode placement at 98849.5 as 2:30 p.m. and four minutes per panel number thereafter.) Too painful to look at, horribly severe decelerations at one point down to zero or a fetal heart rate below 30, with the uterine pressure gain on the machine turned to zero, [83b] can be viewed at panels 98898 - 98900, 16 minutes before the Pitocin is stopped! Certainly it was obvious to the jury, and obvious to anyone looking at the monitoring strips, and Plaintiff should not have to once again prove, now to the Michigan Supreme Court, that a fetal heart rate down to less than 30 for a minute [83b], after repeated and progressively worsening decelerations in fetal heart rate beginning at 98866 [66b] (2:36 p.m.), which continued till the monitoring strips ran out at 6:28 p.m. at 98909 [88b], were indicative of diminished blood flow and therefore diminished oxygen delivery and head compression, which was damaging to fetal brain. And Pitocin lingers in the system for a period of time even after the Pitocin is shut off. This is the epitome of negligent oversight of a patient and negligent administration of a potentially dangerous drug. This was a nightmare .



(11) In the Oakwood Hospital delivery record, omitted from Oakwood's Brief and Appendix, beside "cord abnormalities" it states: "Large." In the initial nurse's examination, also excluded from Oakwood's Brief and Appendix, at 19b, the nurse recorded her observation: "*large* umbilical cord moist and clamped." This recorded observation of cord enlargement was a fact in evidence. Testimony regarding the compression of the blood supply to the fetus during labor, which included the cord, came from multiple witnesses. Interestingly, defense witness Dr. Dombrowski, M.D., obstetrician, testified and conceded that there "can be significance to this baby having a large umbilical cord." [247b-248b, lines 22, 23, 1]

(12) In the initial nurse's examination, excluded from Oakwood's Brief and Appendix, at 19b, the nurse recorded: "Molding of head." This entry in the record, as a fact in evidence, definitely establishes the prior existence of head compression and trauma! Mitchell Dombrowski, M.D., was asked by defense counsel about physical findings in a hypothetical newborn following trauma, and **the first thing he identified as indicative of "trauma" was "molding of the head:"**

- Q: What about trauma from some other means coming through the birth canal, Doctor, what would the baby have looked like if it was **traumatized** coming through the birth canal? [249b]
- Q: What would you expect he would have looked like if it was **traumatic**?
- A: The most common thing is **molding of the head**, actually not overlapping of the sutures, that's quite rare... [250b-251b] [emphasis added]

(13) In the initial nurse's examination, excluded from Oakwood's Brief and Appendix, at 19b, the nurse recorded the respiratory rate at 64 which represents tachypnea, or rapid respirations, and is abnormally elevated. Subsequently, respiratory rate was noted as "unchanged." The heart rate was 160, which was a "tachycardia." [291b, at 54, lines 11-12]. Ronald Gabriel, M.D., pediatric neurologist, testified that the normal newborn respiratory rate is up to 45 and that the rate of 64 is "abnormally fast," which is particularly significant because the likely explanation is that Antonio was "blowing off excessive acid because of the brain injury."

[167b] Mitchell Dombrowski, M.D., obstetrical expert witness, explained the mechanism driving tachypnea after oxygen deprivation, where a child would “blow off more CO<sub>2</sub> and he’d breath more rapidly.” [245b, lines 21-23]

(14) On 92a, the newborn nursery flow record, the initial recording of the skin was “black” before being recorded the next day as “clear.” The defense at trial attempted to state that “black” and “clear” on exam were somehow references to race. Skin color is an important physical finding at birth and routinely followed and recorded. Healthy newborns are pink according to testimony at trial, and are not black, dark, dusky or grey, and Antonio’s newborn skin exam was noted as having changed in the record from “black” to “clear.” [92a] See also the newborn examination by the nurse, excluded by Oakwood in their Brief and Appendix, on 19b, which stated: “color of skin black.”

(15) Corroboration for an forehead molding pattern was identified by a “hostile” defense witness Stephen Donn, M.D., Director of Neonatology at the University of Michigan. [312b-313b] The Newborn Hospital Photograph [20b, 21b] establishes and displays an obvious protuberant raised area across the newborn’s entire forehead just above the eyebrows [20b-21b] which is a fact in evidence helping to definitively establish the consequence of the head undergoing a traumatic force in traversing the birth canal. The photograph [20b-21b] was examined by neonatologist defense expert Dr. Donn at trial who testified that it did reveal a molding pattern “over the whole surface of the forehead starting above the eyebrows” [312b, lines 14-16, 17-18] Dr. Donn stated that the forehead molding pattern was caused by the birth canal on the head as it passes through. [312b, lines 21-22] Dr. Donn described the birth canal is made up of a “bony skeleton and muscle...” [312b, line 25] He refused to place a name to the pattern definitely, but admitted that, hypothetically, whether this molding was indeed a brow pattern, would depend on how much time Antonio spent in contact with the birth canal, and that one can expect this type of molding of the forehead if Antonio had spent a few hours in a brow presentation in the birth canal. Thus, it was possible that a brow type molding pattern matched the appearance of Antonio’s molding pattern in the photograph. [313b, lines 5-18] Dr. Donn did NOT offer any alternative explanation for the

forehead molding that he had identified in the photograph.

(16) The newborn photograph[20b,21b], omitted from Oakwood's Brief and Appendix, also displayed an additional neurological physical finding: a "cortical thumb." Defense expert neurologist Michael Nigro, D.O. admitted that the photograph may indeed reveal a cortical thumb, [274b-277b] though he attempted to minimize its significance. However, pediatric neurologist Dr. Ronald Gabriel testified that this obvious cortical thumb, as depicted on the photograph, as a fact in evidence, is a well known significant neurological "cortical" physical finding on examination, and cortical refers to brain cortex, so the finding is a reflection of "some damage having occurred to the right side of the brain" [170b, 172b, 173b]. Dr. Gabriel also correlated this photograph's findings with the MRI of the brain [172b-173b], and explained it as a "classical sign of either temporary or permanent brain injury." [184b]

(17) The newborn photograph [20b, 21b] displayed yet another obvious newborn neurological physical finding: extreme right lateral deviation of the eyes. Again, this was and is an obvious fact in evidence. Michael Nigro, D.O., defense expert pediatric neurologist, agreed that eye movements to the right, as depicted in the newborn picture, would be consistent with a right hemisphere cortical brain problem if the eyes were staying in that position consistently. [279b-280b] Ronald Gabriel, M.D., expert pediatric neurologist, testified that the picture was "not the picture of a normal newborn," [169b] as the extreme deviation to the right of the eyes was an abnormal neurological physical finding which reflected some "damage having been done to the right side of the brain..." [172b]

(18) The newborn photograph [20b, 21b] was in color at trial and was observed by Dr. Gabriel to display a right eye somewhat swollen shut when compared to the left, "indicating a degree of edema or fluid...an area that was "raised and darker" compared to the left side, and some "swelling redness" on the right side of the forehead that was not seen on the left. [171b] If any of this wasn't true, the trier of fact who was also looking at the photograph would know it and would have seen it.

(19) Defendant Dr. Kittur testified and acknowledged the fact that he saw in the records no suggestion that a physician examined the infant in the first 24 hours of life. [309b-310b, at 292] Dr. Kittur admitted that he was surprised by this fact and admitted that "it was a little unusual." [309b-310b, at 292, lines 1-14] Defense expert neonatologist Steven M. Donn, M.D. testified that there was no evidence that any physician examined Antonio at any time on 7-17-97 [313b, lines 5-8], and at any time in the first 24 hours of life. [313b, lines 9-15]<sup>12</sup> Dr. Gennaoui had testified at deposition that he did not do the Apgar testing which is done by the nursing staff. [100b, line 17] Dr. Gennaoui acknowledged, but couldn't explain, why there were two different pairs of one and five minute Apgar scores recorded in the chart. [275a-276a] [85a, 89b]

(20) The first and only recorded physician examination of Antonio in the entire Oakwood Admission Record was a brief note written by a pediatrician on the third day of life which stated, in pertinent part, that the newborn was generally "Alert & Active," and under central nervous system ("CNS") exam the brief note merely stated: "good moro, suck." [86a] That is it. He was alert and active, "good moro" and he could suck. The note does not reflect even a basic neurological examination of the movements or positioning of the eyes, posturing of the hands, hip clicks, resistance to motion, muscle tone, deep tendon reflexes, or other reflexes - they are not described. Blood gases were not done. No other neurological information. Antonio is there for 3 days of his life and has one brief note documenting that a physician actually saw him face to face. Other than Dr. Gennaoui

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<sup>12</sup> It is uncontested that a newborn examination by a physician within 24 hours of birth is mandatory under the standard of care in this country. (this standard of care was not at issue or causally related in this case) Without an examining physician, when the tree falls, no one is there to hear it. A raised area over an entire forehead is evidence that a force took place to create it. If the law were to eliminate circumstantial evidence, deduction or inference as proof of causation, it would make it impossible for any malpractice plaintiff to ever overcome this philosophical causation conundrum unless the eye witnesses or perpetrators provide honest disclosure. Sherlock Holmes would be of no assistance. Currently, we are left with medical record statements such as, for example, "Decelerations noted Gennaoui aware" in the nursing notes - less than frank disclosure, but providing an inference that there was a worried nurse present who recorded the fact that she had placed Gennaoui on notice of a problem with the labor.

seeing the newborn exit the vagina, after he gave the pudendal anesthetic block and made the episiotomy, it would be a lie to suggest that the Oakwood medical record provides more of a newborn examination by any physician.

### **III. ARGUMENT**

**A. GIVEN THE FACT THAT THE LOWER COURT, ON THE RECORD, GRANTED OAKWOOD'S REQUEST TO FILE FURTHER PLEADINGS ON THE DAVIS-FRYE ISSUE PRIOR TO DR. GABRIEL TAKING THE STAND, THAT THE COURT STATED THE DENIAL OF THE HEARING REQUEST WAS JUST HER RULING "TODAY" AND THAT OAKWOOD COULD "SUBMIT ANYTHING ADDITIONAL" AND SHE "WILL TAKE A LOOK AT IT," [20A, LINES 12-15, AND 21A, LINES 5-8], THAT OAKWOOD AGREED ON THE RECORD THAT IT WOULD DO SO, AND THE RECORD IS CLEAR THAT NO FURTHER PLEADINGS WERE EVER FILED AS TO THE DAVIS-FRYE ISSUE, AND THE DAVIS-FRYE HEARING WAS NEVER RAISED BY OAKWOOD BEFORE THE VERDICT, THIS COURT SHOULD FIND THAT OAKWOOD ABANDONED THEIR REQUEST FOR A DAVIS-FRYE HEARING, FAILED TO PRESERVE IT, AND DENY THEIR DESPERATE ATTEMPT TO RESURRECT IT ON APPEAL.**

**B. GIVEN THE FACT THAT OAKWOOD IDENTIFIED THE BASIS FOR THE PRE-TRIAL REQUEST FOR A DAVIS-FRYE HEARING AS AN ALLEGED DISPUTE OVER "WHETHER PITOCIN CAN CAUSE TRAUMATIC HEAD INJURY AGAINST MOTHER'S ANATOMY," [17a, LINES 21-25], WHICH EVERY TRIAL WITNESS ESTABLISHED AS UNIVERSALLY HELD AS TRUE, THIS COURT SHOULD RULE THAT THE COMPLETE LOWER COURT RECORD MAKES IT CLEAR THAT THERE WAS NO BONA FIDE DAVIS-FRYE ISSUE OR "NOVEL" DAVIS-FRYE EVIDENCE EVER RAISED IN THE LOWER COURT AND THAT THE LOWER COURT DID NOT ERR WHEN ASKING THAT THE REQUEST FOR A DAVIS-FRYE HEARING BE ACCOMPANIED BY SOMETHING MORE THAN THE ATTORNEY'S OWN WORDS.**

**C. WHEN A DAVIS-FRYE HEARING REQUEST WAS MADE BY DEFENDANT WITHOUT ANY EXPERT AFFIDAVIT OR LITERATURE SUPPORT, AND THE PLAINTIFF CAME FORWARD IN HIS RESPONSE [6b - 10b] WITH SUBSTANTIAL EVIDENCE OF WIDESPREAD SCIENTIFIC SUPPORT, RELIABILITY AND ACCEPTANCE OF ONE OF HIS CHALLENGED EXPERT'S TESTIMONY WHICH EXPRESSED A PITOCIN INDUCED HEAD COMPRESSION TRAUMA MECHANISM OF FETAL HEAD INJURY, AND THE RESPONSE INCLUDED MAIN STREAM**

**LITERATURE CITATIONS, NEONATOLOGY TEXTBOOK EXCERPTS AND THE PHYSICIANS DESK REFERENCE (PDR), WHICH IS OVERSEEN BY THE FDA, THE LOWER COURT DID NOT ERR TO HAVE DENIED OAKWOOD'S REQUEST ON THE DAY OF THE HEARING AND TO HAVE GRANTED OAKWOOD'S REQUEST TO FILE FURTHER PLEADINGS.**

**Standards of Review** The admission of expert opinion testimony will not be reversed on appeal absent an abuse of discretion. Rouch v Enquirer & News (1990), 184 Mich App 19, 457 N.W.2d 74, 17 Media LR 2305, app gr (1991), 437 Mich 1035, 472 N.W.2d 637 and vacated on other grounds (1992), 440 Mich 238, 487 N.W.2d 205, 20 Media L R 2265, reh den (1992), 440 Mich 1209, 488 N.W.2d 736 and cert den (1993), 507 US 967, 122 L. Ed. 2d 774, 113 S Ct 1401, reh den (1993) 507 US 1407, 123 L Ed 2d 507, 113 S Ct 1891.

Under MRE 702, the Davis-Frye standard is applied to determine if “*novel*” scientific evidence has gained general acceptance in the scientific community.” People v King, 158 Mich App 672, 675; 405 N.W.2d 116 (1987) cited by People v Marsh, 177 Mich App 161; 441 N.W.2d 33 (1989). See also People v Young, 418 Mich 1, at , 340 N.W.2d 805; (1983) (“We hold that the admissibility of novel scientific evidence is governed by the Davis-Frye standard”). The determination of whether scientific evidence is “novel” would be a decision made concerning the admissibility of evidence, and therefore is reviewed according to an abuse of discretion standard. Gagnon v Dresser Industries Corp, 130 Mich App 452, 463; 344 NW2d 582 (1983), aff’d 424 Mich 166 (1985). Errors in the admission or exclusion of evidence are harmless, and shall not be disturbed on appeal unless “refusal to take this action appears to the court inconsistent with substantial justice.” MCR 2.613(A) An “abuse of discretion” was defined in Spalding v Spalding, 355 Mich 383, 384-5; 94 NW2d 810(1959) as follows:

An abuse of discretion involves far more than a difference in judicial opinion between the trial and appellate courts. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an ‘abuse’ in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of

reason but rather of passion or bias. Cited with favor in Carbonell v Bluhm, 114 Mich app 215, 222; 318 NW2d 659, 662 (1982).

**ARGUMENT:** Oakwood filed a motion *in limine* on the first day of the then-scheduled trial which asked the lower court to exclude all testimony from pediatric neurologist Dr. Gabriel, *and in the alternative* asked for a Davis-Frye hearing. [1b - 5b] The written motion itself did not identify the specific issue, and contained nothing more than the defense counsel's blanket opinion and attached the entire discovery deposition transcript of Dr. Gabriel without any other type of support. No Order was ever entered or proposed by Oakwood - they abandoned the issue. As of today, Oakwood still hasn't produced any support for its fabricated previously abandoned dispute that oxytocin cannot cause traumatic head injury against mother's anatomy.

Oakwood, desperate on appeal, is apparently once again attempting to resurrect their previously abandoned argument as stated on the record at a motion hearing held on January 21, 1997:

"It is not disputed that use of Pitocin can lead to hypoxia which can cause brain damage. **What is disputed is that use of oxytocin can cause traumatic head injury against mother's anatomy. That's what's in dispute here.**" [16a, lines 21-25] [emphasis added]

Notwithstanding his admission as to the effects of Pitocin on fetal brain, the implied assertion, totally unsupported then and now, was that oxytocin cannot cause traumatic head injuries against mother's anatomy. As was unanimously expressed by defense and plaintiff causation testimony at trial, and further corroborated by both physician defendants, nothing could have been further from the truth. This supposition, thrown in as an excuse for alternative relief three months pre-trial and then abandoned until after trial, was patently absurd on its face. Counsel for Oakwood admitted on the record that he had not actually read plaintiff's written Response to his motion. [21a, lines 2-4] After he read the Response, he no doubt dropped the issue, and the appellate attorneys picked it up post-verdict while grasping at straws. Furthermore, Oakwood has never produced any support or citation for this false premise which it previously abandoned.

While plaintiff must prove more than mere possibility, the Davis-Frye hearing request attempted to challenge a known fact that Pitocin can cause traumatic fetal head injuries. The facts in evidence formed the basis that direct head compression effects was one of the mechanisms responsible for what happened to Antonio in response to the Pitocin effects on the uterus. In addition, the facts in evidence proved that Pitocin also caused intermittently reduced blood flow, and therefore oxygen, to Antonio and his brain and, consequently also proximately caused his brain damage. Since Oakwood is not challenging blood and oxygen reduction as a potential cause for brain injury, and both of plaintiff's experts testified to this mechanism, the entire Davis-Frye issue, which alleged a dispute involving only traumatic head injury, should be moot for this reason as well.

Although Oakwood failed to attach its referenced motion anywhere on appeal, plaintiff includes it in his Appendix. (Filed January 9, 1997)[1b -5 b] The motion, without specifying any particular page numbers in the testimony, in paragraph four (4), called Dr. Gabriel's "testimony and opinions regarding plaintiff's condition and the causes for it...groundless in the extreme." In addition, paragraph five (5) of this same motion *in limine* argued that Dr. Gabriel was not competent to testify as to standard of care under the law - a point of law upon which the trial court subsequently ruled in defendant's favor and therefore is moot. The motion was non-specific but on the record the attorney for Oakwood clearly stated what he considered to be the disputed Davis-Frye issue. [16a, lines 21-25] At paragraph three (3), the motion broadly and generally stated that "The plaintiff's theories of liability and proximate cause are based on complex and unsupported medical testimony proffered by an expert who can offer no support for his scientific views other than his own opinion."

The plaintiff responded to the Motion to Exclude Dr. Gabriel's Testimony, or in the Alternative for a Davis-Frye Hearing, in writing [6b - 10 b] and included in his Response, at page three (3)[8b] and page four (4)[9b], inter alia, an extract from the 1995, or 49<sup>th</sup> Edition, pages 2708 and 2709, of the *Physician's Desk Reference* ("PDR"). Page four (4)[9b] of Plaintiff's Response also referenced and extracted from a very respected neonatology textbook called *Neonatology, Pathophysiology and Management of the*



*Newborn*, by Gordon B. Avery, M.D., Ph.D., 2d Ed., 1981 which made it quite clear that the compressive detrimental effects of labor on the fetal brain were well known, accepted as fact and incorporated into an informed medical understanding of labor. In addition, Plaintiff attached a copy of Dr. Gabriel's C.V. [10b] to his written Response, briefly described Dr. Gabriel's extensive pertinent experience, [7b-8b] and brought some pertinent medical literature to the motion hearing, [13a] including a *Pediatric Annals* Article on Cerebral Palsy referencing "trauma" and "articles from the 60's" [14a].

At the hearing, the court wisely wanted more information and specifically asked for it:

THE COURT: The problem with your motion is you don't have any Affidavits. You don't have any evidence in here that – I mean, that there should be a Davis-Frye Hearing. I mean, it's just you as an attorney saying that. (lines 17-21) [17a]... all you attached to your Motion is a copy of Dr. Gabriel's deposition, and then you allege that there's no scientific literature or anything to support his point of view. (lines 23-25) [17a-18a]

THE COURT: I mean, that would mean that everybody can come in here and allege that whatever everybody's expert is saying is not supported by scientific data, and I would have to hold a Davis-Frye Hearing in every single case where any expert had to testify. And that's not the standard. You have to submit some evidence to that I need a Davis-Frye Hearing, other than you just saying it. (lines 8-15) [18a]

THE COURT: You have no evidence that that's true or that his theories aren't supported. (lines 6-8)[19a]

The Court wanted something other than the attorney's words, particularly after reading plaintiff's response. As an applicable example, a MCR 2.116 (C)(10) summary disposition motion requires more than attorney words from the movant and non-movant to support the grounds MCR 2.116( C)(10)(G)(3), and for the non-movant to establish a dispute of fact. MCR 2.116 (C)(10)(G)(4) Oakwood's defense counsel (John Perrin) asked if he could indeed submit some additional pleadings and the Court made it clear she was currently only addressing the issue for "today" and granted Oakwood's request to submit further pleadings, and agreed on the record to look at "anything additional" which Oakwood wanted to submit to which Oakwood's counsel agreed:

Mr. Perrin: *I'd like to submit* some additional pleadings *on this* prior to the time of Dr Gabriel taking the stand...[20a, lines 12-15]

THE COURT: I mean, you can submit anything additional. I will take a look at it. But that's my ruling *today*.  
[21a, lines 6-8]

Mr. Perrin: *Okay* [21a, lines 6-10]

And Mr. Perrin agreed: "Okay." Despite indicating that he would submit further pleadings, counsel for Oakwood did not submit anything further, did not submit an affidavit, and never raised the issue again - until after the verdict. Oakwood did not file a motion for rehearing. Oakwood never made any further Davis-Frye requests. Oakwood never even had an order entered on the issue because the issue was abandoned. Oakwood instead is attempting to benefit now from what they abandoned before trial. Absent a specific objection, this issue should be deemed to have been waived. People v Watts, 145 Mich App 760, 764; 378 N.W.2d 787 (1985), lv den 424 Mich 889 (1986).

Identical procedural facts led the Michigan Supreme Court to uphold a Court of Appeals ruling, and also conclude that an issue was not properly preserved for appellate review, in Jones v Porretta, 428 Mich 132, 158-159, 405 N.W.2d 863 (1987). In Jones, the trial court had stated that it would reconsider its decision when and if the attorney would present authority. Like Oakwood's attorney, whose request for an opportunity to file additional pleadings was granted, the attorney in Jones, at 158-159, was stated to have never reintroduced the issue again, leading the appellate court to "conclude that plaintiffs abandoned this issue as a matter of trial strategy. For us to reverse on this basis now might encourage parties to harbor error on the record to be used in the event of an unfavorable verdict." Counsel for Oakwood, having had its request for the opportunity to file additional pleadings granted, but never reintroducing the issue again, abandoned the issue and failed to properly preserve the issue for appeal under Jones.

Oakwood abandoned the issue because there is no dispute, i.e. there was and is no one who could possibly in good faith support its allegation in the lower court that Pitocin doesn't, in theory, sometimes cause traumatic injury to fetal heads against mother's anatomy. Oakwood's own witnesses refuted it at trial and

it never had any merit. It goes without saying that the idea of Pitocin causing fetal head injury wasn't and isn't "novel" and it was never in honest contention.

The extensive testimony at trial made it clear that there is no dispute over the fact that oxytocin can indeed cause traumatic head injuries against mother's anatomy. At the time of trial, Steven M. Donn, M.D. was director of Neonatology at the University of Michigan and quite a tough and hostile witness. He was called as a causation witness by defendants on May 13, 1997. He testified that he had published in the areas of the relationship between asphyxia, intra-partum asphyxia, that is, asphyxia during labor, and trauma during labor in relationship to subsequent neurologic outcome. Establishing and endorsing, in theory, the "two potential mechanisms," just as alleged by plaintiff in this case, Dr. Donn testified as follows:

Q: What is the mechanism by which Pitocin can harm -- Pitocin administered to a mom during labor can harm a fetus?

A: The -- **the two potential mechanisms through which injury may come about include trauma and hypoxia.** There may be trauma from excessive contractions of the uterus. There may be hypoxia by having a decrease amount in the blood flowing to the fetus. [317b, lines 8-15]

Hence, contrary to the false allegation made in the defense request for a Davis-Frye hearing and in the Oakwood Brief, neonatologist Dr. Donn, along with others, testified in support of plaintiff's theories of causation and endorsed the universally held view that traumatic and ischemic-hypoxic brain injury are caused by Pitocin.

Although, like Dr. Donn, he disagreed with the ultimate conclusion made by plaintiff in this case, defense causation witness Michael Nigro, D.O., pediatric neurologist, also testified in complete support of the existence of plaintiff's causal theories on this issue. He provided first-hand eye-witness testimony ("I've seen that") which again established and endorsed the existence of a potential causal nexus between tumultuous labor and fetal "traumatic injuries of the skull" and "closed head injury" and "trauma, injury to the brain" as follows:

"If you had trauma, injury to the brain, if the skull is affected, and **I've seen that.**

**I've attended newborns who had traumatic injuries to the skull, it's the equivalent of a severe closed head injury when you look at, again, the end result. ...It's like being in an auto accident. It's like being hit by a parent. It's like being shaken. (412a-413a, lines 22-23; lines 2-13)[emphasis added]**

Dr. Gennaoui agreed that "An adverse reaction to oxytocic agents, like oxytocin, includes **trauma** to the infant, for example, hypoxia and intra-cranial hemorrhage." [219b, vol. 14, p.249]

Dr. Kittur testified [310b, at 295] that he agreed that "induced uterine hyper-motility by oxytocin can cause permanent brain damage in the infant" and repeated this as true when problems with high doses of Pitocin are involved, at page.[ 311b at 303] Dr. Kittur agreed that "in the event of uterine hypertonicity, while the fetus is inside the uterus, mechanical trauma can occur to the fetus." [298b, at 203]

Seymour Ziegelman, M.D., testified as a defense expert obstetrician witness [255b] on May 7, 1997 and agreed that when used inappropriately, Pitocin can lead to accidents such as trauma not only to the mother, but to the infant as well. [266b, lines 15-18]

Mitchell Dombrowski, M.D., Chairman of Obstetrics at Wayne State University, agreed that Pitocin can damage fetuses and that it can "**cause trauma to a fetus.**" [238b, lines 25] [239b, lines 1-5] He agreed that tumultuous uterine contractions prevents appropriate uterine flow and oxygenation to the fetus. [242b, line 18] He admitted that the resistance of the birth canal to the descent of the head may cause intra-cranial trauma. [242b, lines 19-23]

Given the preceding cited testimony from defense witnesses Nigro, Donn, Ziegelman, and Dombrowski, defendant Kittur and defendant Gennaoui, when Oakwood's Brief stated that: "plaintiff's causation theory is not even recognized as anatomically possible in any specialized field of medical science and that the theory conflicts with the established factual record" it is quite obviously a huge Oakwood fabrication. In short, the Oakwood Brief

is revealed to be not only offensive, but a medical and scientific fraud.<sup>13</sup>

People v Young, 418 Mich 1; 340 N.W.2d 805 (1983), cited by this Court in its granting Order, held that “the admissibility of novel scientific evidence is governed by the Davis-Frye standard.” Young involved a dispute over a novel scientific technique or method: the reliability of serological electrophoretic analysis. The Young opinion, at page 26, cited an opinion by Justice Kavanagh in People v Salvadore, 415 Mich 615; 329 N.W.2d 743 743 (1982), which reiterated that the “purpose of the Davis-Frye rule is to prevent the jury from relying on unproven and ultimately unsound scientific methods.” Other Michigan cases cited in Young involved other novel scientific methods including: lie detector testing, voice print identification evidence and hypnotically refreshed testimony. An identified scientific “method or technique” was not involved or challenged in this case.

Instead, the Davis-Frye request in this case merely involved an attorney’s statement on the record that he was disputing the “theory” that Pitocin could cause fetal head injury against mother’s anatomy. This alleged dispute over the existence of a Pitocin-caused fetal closed head injury, a dispute which Oakwood dropped because no one doubts the theory that Pitocin can cause traumatic head injury, involved a causation mechanism opinion which stated that brain injury arose in the fetus from a closed head injury. The fetal closed head injury theory did not arise from or involve in any way a novel scientific method or technique, or any novel idea or theory, so the dispute does not implicate People v Young, and does not implicate the Davis-Frye rule.

Since Davis-Frye has been held to apply to “novel” scientific evidence, it follows that the threshold issue for a trial court is to initially identify the dispute, and appropriately address the issue of novelty. It would not take much for a movant to demonstrate, for the sake of argument, novelty. The plaintiff did file a Response. The lower court Judge did undertake its role as an evidentiary gatekeeper, read the plaintiff’s Response to the Motion

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<sup>13</sup> The author has found that often an overly vehement table pounding legal argument is actually a projection of what the table pounder, here Oakwood, is guilty of itself. Disputing fetal closed head injury against mother’s anatomy as a side effect of Pitocin was naive - now it’s a sham.

In Limine (which is more than Oakwood's counsel did [21a, lines 2-4]), spoke with Oakwood's counsel about their total lack of any medical support or affidavit for their request, and granted Oakwood's request to file further pleadings on the issue. She left the door open for them. Under these circumstances, Judge Youngblood served her gate keeping function admirably and, given the absence of any offering at any time from Oakwood on the issue of novelty, the issue was abandoned.

Exaggeration does not make for a stronger argument, but can make for a more effective lie. Extreme exaggerations in legal filings are often more the hallmarks of anxiety than authority. Oakwood's lawyer, in hyperbolic form, challenged the fetal closed head injury "theory" by alleging that the "theory" that Pitocin can cause traumatic fetal head injuries against mother's anatomy was "groundless in the extreme." [ 3b, para. 4] Yet, he cited no source for this statement and no one on behalf of Oakwood has stepped forward with any citation or source for their abandoned false notion that fetuses during labor do not experience closed head injuries on Pitocin.

Notwithstanding the absence of a challenge to a scientific technique or method, Davis-Frye has consistently been held to be applicable only to "novel" scientific evidence. Young, at 26 ("our invariant and unanimous application of the Davis-Frye rule to the admissibility of novel scientific evidence"). Oakwood's pre-trial challenge to plaintiff's fetal closed head injury theory that Pitocin can cause traumatic head injury against maternal anatomy was not challenged in any way at trial, but instead was substantiated at trial by all witnesses, including defense causation witnesses Drs. Donn and Nigro, to be universally accepted, reliable, and certainly not novel. As was explained by plaintiff in his Response to Oakwood's pre-trial motion, and proven by all witnesses at trial, fetal traumatic head injury from Pitocin is universally held as a potential side effect of excessive Pitocin, and therefore, was uncontested as a potential brain injury mechanism.

Plaintiff's obstetrical expert witness, Paul Gatewood, M.D., obstetrician, testified to the presence of uterine hyper-stimulation [123b], the presence of uterine contraction "coupling" with only 10 to 15 seconds

between contractions [116b-117b], elevated uterine baseline pressure [188a][126b], “coupling” without relaxation of the uterus **with “a very hyper-stimulated uterine wall”** [130], marked evidence of prolonged over-dosage of Pitocin [190a], and medical records indicating that Pitocin was placed in two bags provided simultaneously. [172a, 180a-187a] Dr. Gatewood continued his testimony, at 209a, lines 1-22, wherein he described placenta and cord compression, but deferred as to the brain injury[ 209a-210a, at line 23]: **“I’m not about to get up here and tell you that because of the hypoxia this is what happened to the baby’s brain. That’s the purview of a neurologist....”** When asked about Dr. Gabriel’s opinion which included **trauma** in addition to hypoxia-ischemia, Dr. Gatewood testified that, **“It’s well known in obstetrical and in neurologic that hypoxia leads to susceptibility to damage and trauma.”** [147b] Dr. Gatewood’s opinions were summarized again in [140b-145b] where he explained that there was reduced blood flow and reduced oxygen to the baby. [146b] He further testified that when the uterus clamps down it can reduce the blood flow to the fetus. [492a] Dr. Gatewood testified, and it is not contested, that in the presence of uterine hyper-stimulation the standard of care dictates stopping the Pitocin immediately. [149b] Dr. Gatewood also repeated that the cord being compressed was anatomically “beside the head.” [152b]

Ronald Gabriel, M.D., made it quite clear that he was not issuing an opinion regarding standard of care and the excessive use of Pitocin because that was an obstetrical judgment beyond his expertise. [187b] He confined himself to his views of the effects of Pitocin on Antonio’s fetal brain from the standpoint of a pediatric neurologist experienced in the field of perinatal neurology and the effects of Pitocin on fetal brain, and expressly did not provide testimony on the standards of obstetrical practice. Defense counsel even attempted unsuccessfully to bait him into making a standard of care statement which is just one of a multitude of examples of Oakwood’s counsel’s attempts to generate error for appeal. [188b] ( “That’s an obstetrical evaluation...and I

would not make a judgment regarding the use of Pitocin"); [190b] ( where Dr Gabriel replies that "This is beyond my area of competency.") Dr. Gabriel testified that after he had reviewed all the records, "I had come to the conclusion that Antonio suffered an injury during labor and delivery." [156b][189b] At 236a-237a, Dr. Gabriel described the mechanisms for the effects on the fetal brain of excessive or hyper-stimulation of the uterus from Pitocin including "direct pressure," "lack of blood flow to the fetal brain" and "Pitocin will clamp down the uterus reducing blood flow of the maternal system to the placenta so that the fetus gets less blood flow from the placenta producing reduced flow to the fetal brain." [237a, Lines 9-13]

As already stated, what Dr. Gatewood called "hypoxia" was the same thing that Dr. Gabriel was referring to as "reduced blood flow." Dr. Gabriel testified with respect to the connection between cerebral palsy and excessive oxytocin in Antonio in describing a "traumatic component as well as a vascular component...that is to say the reduced blood flow..." [164b-165b] Dr. Gabriel explained how reduction of blood flow to the fetal brain effectively means reduction of "oxygen in delivery." [198b-199b] Dr. Gabriel's testimony was interrupted by defense counsel, Scott Saurbier, who requested an opportunity to voir dire the witness, on the foundation and his background of his knowledge regarding a particular study involving the production of cerebral palsy in animal fetuses using Pitocin, [239a], and the court granted Mr. Saurbier's request. Until appellate lawyers entered the case post-verdict, no one involved in the trial challenged the trauma causation theory as unscientific, no one would have considered it in light of how it was so overwhelmingly supported at trial. Mr. Saurbier made no request for a Davis-Frye hearing or anything of the sort. No one ever requested any Davis-Frye hearing or brought it up again after the January 21, 1997 hearing until well after the verdict.

Dr. Gabriel's testimony with respect to mechanisms of injury was solidly grounded in the literature, which he described. [237a-239a] He cited an article in *Neurology*, 1969, and the *Am J Ob Gyn* 1972. [159b] He recalled that an animal model utilizing Pitocin "to produce brain damage in fetuses" was the first of its



kind. [160b] He stated that the basis of his opinions included the information contained in the PDR, the AMA bulletins, pharmacological textbooks, and, for example, Williams Textbook of Obstetrics as it relates to Pitocin.

[161b]

If Dr. Gabriel's opinions were somehow outlandish or unfounded, why didn't the defense impeach him with any of these commonly utilized source books or materials? Because the "theory" was common knowledge and because he was correct, of course. There was nothing "novel" in anything that he stated.

In People v Marsh, 177 Mich App 161; 441 N.W.2d 33; (1989), the Court found that scientific evidence like x-rays and photographs were inherently not novel, can be viewed by the jury, and therefore properly submitted to the jury without a hearing. As in Marsh, this case involved the experts' reading of commonly used medical data recordings, such as photographs, x-rays (MRI), fetal-uterine monitoring recordings, to reach conclusions. The recordings and photographic evidence was easily viewed by the jury.

The challenge to a closed head injury theory may have started as just one lawyer's naivety or confusion. After the verdict, its resurrection becomes another example of an attempt by Oakwood to plant negative prejudice in the mind of the Court regarding Ronald Gabriel, M.D. or any other witness who is willing to provide competent informed professional consultation to plaintiffs in medical malpractice cases. Dr. Gabriel was educated at Yale, Boston University and U.C.L.A., was twice a fellow at the National Institute of Neurologic Disease, is board certified in both pediatrics (1968) and pediatric neurology (1973), was a Consultant to Dewitt and Walter Reed Hospitals while serving his country (achieving rank of Major) in the Army, his medical teaching experience is extensive, he has published in standard textbooks of pediatric neurology as well as periodicals, he is a fellow in the American Academy of Pediatrics, Section on Perinatal Medicine, he teaches neuroimaging, is on the board of reviewers, since 1992, for the *Journal of Perinatology*, which is the leading perinatology journal in the country, and as of 1997, had maintained for years one of the largest and busiest pediatric neurology practices in the State of California [10b, 7b] where he treats neurologically impaired children.

**D. WHEN PLAINTIFF'S EXPERT, BOARD CERTIFIED OBSTETRICAL EXPERT DR. PAUL GATEWOOD, WAS COMPETENT TO TESTIFY TO THE OBSTETRICAL STANDARD OF CARE, AND PEDIATRIC NEUROLOGIST EXPERT DR. GABRIEL WAS COMPETENT TO TESTIFY AS TO BRAIN DAMAGE CAUSATION, AND EACH ON THE RECORD APPROPRIATELY DEFERRED TO THE OTHER'S SPECIALTY, AND EACH BASED THE EXPERT TESTIMONY UPON THE FACTS IN THE MEDICAL RECORDS AND ADMITTED EXHIBITS, THE LOWER COURT DID NOT ERR IN ALLOWING THEIR TESTIMONY, AND MOTIONS FOR JNOV AND DIRECTED VERDICT WERE CORRECTLY DENIED.**

**Standards of Review**

Facts and all legitimate inferences therefrom must be viewed in a light most favorable to the non moving party on review of a denial of a motion for directed verdict and judgment notwithstanding the verdict. Farwell v Keaton (1974), 51 Mich App 585, 215 NW2d 753, rev'd on other grounds (1976) 396 Mich 281, 240 NW2d 217. If reasonable minds could differ, then the question is one for the trier of fact. Dundee v Puerto Rico Marine Management, Inc. (1985) 147 Mich App 254, 383 NW2d 176, app den (1986) 425 Mich 858. The admission of expert opinion testimony will not be reversed on appeal absent an abuse of discretion. Rouch v Enquirer & News (1990), 184 Mich App 19, 457 N.W.2d 74, 17 Media LR 2305, app gr (1991), 437 Mich 1035, 472 N.W.2d 637 and vacated on other grounds (1992), 440 Mich 238, 487 N.W.2d 205, 20 Media L R 2265, reh den (1992), 440 Mich 1209, 488 N.W.2d 736 and cert den (1993), 507 US 967, 122 L. Ed. 2d 774, 113 S Ct 1401, reh den (1993) 507 US 1407, 123 L Ed 2d 507, 113 S Ct 1891. The question of whether expert testimony will assist the trier of fact is addressed to the discretion of the trial court. Slocum v Ford Motor Co. (1981) 111 Mich App 127, 314 NW 2d 546. The qualification of a witness as an expert is a matter for the discretion of the trial court. Jones v Sanilac County Rd. Com. (1983), 128 Mich App 569, 342 N.W.2d 532, app den (1984), 419 Mich 936. The standard for review of witnesses' competence is that of abuse of discretion. Green v Jerome-Duncan Ford, Inc., 195 Mich App 493, 498 (1992). A decision that a trial court makes concerning the admissibility of evidence is also reviewed according to an abuse of discretion

standard. Gagnon v Dresser Industries Corp, 130 Mich App 452, 463; 344 NW2d 582 (1983), aff'd 424 Mich 166 (1985). Errors in the admission or exclusion of evidence are harmless, and shall not be disturbed on appeal unless "refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A) An "abuse of discretion" was defined in Spalding v Spalding, 355 Mich 383, 384-5; 94 NW2d 810 810 (1959)

**ARGUMENT:** The extensive facts stated in the Introduction and Factual Summary, supra, are hereby incorporated by reference. Dr. Gabriel is a pediatric neurologist who is board certified in both pediatrics and pediatric neurology as well as author of book chapters and articles on relevant subjects related to brains in pediatric neurology. [7b,10b] These are the exact credentials called for and were identical to, or superior to, those of defense witness Dr. Nigro. Dr. Gatewood is board certified in obstetrics and an assistant professor of Obstetrics at Northeastern Ohio University's College of Medicine. [341b] Each had over 25 years of extensive experience both teaching and treating patients. There is simply no legitimate argument that the court abused its discretion, based upon qualifications, in allowing Dr. Gabriel to testify as to causation or the mechanisms of brain injury by the Pitocin, or to allow Dr. Gatewood to testify as to the standards of care or the presence of a Pitocin overdose, inappropriate Pitocin administration, uterine hyper-stimulation, elevated uterine pressures, or reduced blood and oxygen delivery to the fetus arising therefrom.

As a pediatric neurologist and pediatrician, Dr. Gabriel was an expert in perinatal pediatrics, pediatric neurology and the effects of Pitocin on fetal brain. [236a] Mechanistically, he identified direct head compression in addition to the reduction of blood flow to the fetus and to the fetal brain as causal mechanisms for the injury arising out of the Pitocin effects on the uterus. [236a-237a, lines 9-13] Dr. Gabriel's testimony explaining the reduction of blood flow to the fetus was completely omitted from, and thus misrepresented as non-existent, in Oakwood's Brief or Appendix. Oakwood's Brief engages in rank misrepresentation by falsely

stating, without citation, that Dr. Gabriel testified to “fetal head trauma and not hypoxia.” (Appellant’s Brief, at 14, line (3)(a))

The other mechanism for Pitocin-related brain injury referred to “pressure” on the fetal head creating trauma on the skull which is a universally known consequence of excessive Pitocin. The closed head injury aspect was described by Dr. Gabriel as a “compression injury over the surface of the brain.” [235a]

Dr. Gatewood testified extensively at trial about the hyper stimulation with elevated non-relaxing pressures of the uterus caused by inappropriate Pitocin (oxytocin) administration. [120b, 121b, 123b, 125b, 130b] The attorney for Dr. Gennaoui, Mr. Watters, even admitted to the jury in his opening that “if this uterus is hyper-stimulated, if it gets too much Pitocin, what that causes is **hypoxia** and you can tell by looking at the fetal, what’s going on with this baby, you can tell indirectly whether there’s anything wrong going on with contractions.” As was explained in detail in the Introduction and continuing Factual Summary, supra, the two bag - two nurse administration of Pitocin was contained in a plain reading of the medical records which were facts in evidence in this case. Oakwood admits that Pitocin was placed into the D5W and provided to the patient (Oakwood Brief page 30, footnote 24) which is verified in 17b, and three other medical record pages show that Pitocin was also placed by a second nurse into the LR I.V. bag which was attached to the patient as well via a piggy-back set-up. [15b,13b,11b]

As fully explained, supra, the extensive facts in evidence, including those omitted from Oakwood’s Brief and Appendix on appeal, made it clear that plaintiff manifested signs and symptoms of head compression injury during labor as recorded in the fetal-uterine monitor recordings and hospital records, recorded in the newborn examination at birth, easily viewed in a newborn hospital photograph, and seen years later in a brain MRI, and that other causes of brain injury had been excluded.

Hence, in this case, there was much more than a reasonable basis, to prove cause in fact. All that is

needed to meet the threshold evidentiary standard when proving factual causation is that the plaintiff “must introduce evidence which affords a *reasonable basis* for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough.” Skinner v Square D Company, 445 Mich 153, at 165; 516 N.W.2d 475 citing also Mulholland v DEC Int’l, Mich 395, 416; 443 NW2d 340 (1989); Prosser & Keeton, Torts (5<sup>th</sup> Ed), § 41, p. 269 [emphasis added]

For a summary disposition motion or directed verdict motion, the evidence must be viewed in the light most favorable to plaintiff! In this case the medical records speak for themselves in any event, but when viewed in the light most favorable to plaintiff, leave no doubt. The legal test regarding the sufficiency of causal proof for directed verdicts or summary judgments is “whether reasonable minds, taking the evidence *in a light most favorable to the non-movant*, could reach different conclusions regarding a material fact.” Skinner, at 166, citing accord with Anderson v Liberty Lobby, Inc., 477 U.S. 242; 106 S. Ct. 2505; 91 L.Ed.2d 202 (1986). [emphasis added] It is reasonable to conclude that when a medical record documents Pitocin going into two different IV bags, by two different nurses, that Pitocin went into two different bags by the two different nurses. It is more than reasonable, undeniable in fact, to reach the causation in fact and proximate causal conclusion. The newborn examination documented numerous abnormalities confirming the existence of injury from trauma and hypoxia: tachypnea (Resp. Rate = 64) which continued “unchanged,” initially the color of the skin was black and changed to clear, there was molding of the head noted in the nursing examination, the newborn hospital photograph revealed obvious edema, facial or brow type molding pattern, extreme deviation of the eyes to the right, and a “cortical thumb” on the left. There was some clinical cause of these changes that arose out of labor. To argue otherwise was specious.

Dr. Michael Nigro, D.O., a defense causation witness, who had a couple of pediatric neurological consultation/evaluation contacts with plaintiff, testified that when he had evaluated the plaintiff, “the etiology was unclear, which meant I wasn’t certain of what the cause was” [407a, lines 3-5] and this was documented in his

notes in the 1981 medical records. [94a “etiology unclear”] Dr. Nigro, in the medical record, documented a focal non-symmetric neurological finding, and noted that Antonio’s “left side” spasticity was “more marked” than his right in his October 29, 1981 consultation when Antonio was 15 months old. [98a] Again, in his last contact with the plaintiff, when Antonio was 12 and ½ years old, he stated in writing that the “etiology is unclear” [100a]

Yet, as a testifying expert witness attempting to defend his client, Dr. Nigro was under pressure to provide an alternative time, and mechanism, for the brain injury, and it was not until testifying live at trial that Dr. Nigro alleged that the condition occurred in the first weeks of life: “probably in the first month of fetal development.” [278b, lines 12-13] Recall, Dr. Nelson testified that cerebral palsy is a “lesion” which means injury - not mal-development. Furthermore, the U. of M.’s MRI brain reading [22b] made it clear that the corpus callosum, a white matter structure of crossing fibers, demonstrated thinning - and it had to have formed first to become “thinned” or injured. The corpus callosum undergoes myelination beginning at 3-4 months of gestation<sup>14</sup>, which is yet another reason that the “first weeks of life” hypothesis provided by Dr. Nigro was inconsistent with the facts in evidence.

Dr. Nigro’s unfounded opinion at trial was completely contradictory to his own medical record, and also made completely impossible by, inter alia, his own testimony regarding the normal growth of plaintiff’s brain during gestation prior to labor and delivery. Microcephaly develops after the brain lesion is on board because the dead portions of the brain don’t grow and the head growth slows down enough to cross lower percentiles and become abnormally small. This takes time, and in this case, plaintiff was not born with microcephaly [281-282b, lines 22-24] and hence has secondary microcephaly which generally arises during the end of gestation or in the perinatal period. If the lesion to Antonio’s brain had occurred in the first month of gestation as Dr. Nigro had testified, Antonio would have been born with a condition known as “primary microcephaly” [281b-282b, lines

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<sup>14</sup> John H. Menkes, *Textbook of Child Neurology*, 5<sup>th</sup> Ed., p.278

22-24] which arises in the first 7 months of gestation. Indeed, Dr. Nigro affirmed in his testimony that the size of the plaintiff's brain at the time of birth was completely normal. [273b, lines 16-18]

In a full paragraph, which plaintiff incorporates by reference herein, the Michigan Court of Appeals' opinion identified additional inconsistencies, if not prevarication, in Dr. Nigro's testimony as to the cause of plaintiff's condition or the timing of plaintiff's lesion. [59a, lines 13 to 28]

All of Dr. Gabriel's testimony was grounded in findings in actual admitted records and exhibits. [154b, 156b, 157b, 235a, 167b (newborn resp rate), 168b-172b, (newborn picture findings), 172b-173b (MRI brain), 177b-178b (pediatrics records), 179b-193b, (fetal-uterine monitor recordings "these decelerations to me indicate head compression as well as compromising perfusion.") 194b, 246a, 254a, 195b (example of hypertonicity in the record), 196b-199b, 256a, 258a, 200b (deceleration to below 30), 201b-204b, (Oakwood's counsel asked and was granted the opportunity to voir dire Dr. Gabriel as to his knowledge on a study which he spoke about from the literature) [239a, 158b-163b (Mr. Saubier argued that Dr. Gabriel "shouldn't be allowed to testify about this study," alleging lack of qualifications and lack of relevancy - but Saubier doesn't raise novelty or challenge a mechanism theory]

The plain reading of the medical record, including the fetal-uterine monitoring recordings, the newborn nursing examination, the four pages referring to Pitocin - three of which place the Pitocin in the LR, (and Oakwood admits that the Pitocin was also in the D5W as do nurse Gyra's own note and testimony at trial), were facts in evidence which fully supported plaintiff's case. The records upon which plaintiff based his case were not speculation or conjecture. It is therefore beyond argument that taking the recorded evidence, particularly in the light most favorable to the plaintiff, a genuine issue of factual causation was indeed presented which was decided unanimously by the jury in this case.

This case presented a case of brain injury caused by the uterine effects of Pitocin on the fetus. Notwithstanding this, even if there is more than one theory of causation, the law allows for more than one theory

of causation as long as there is one (1) which is logical and that has a basis in the evidence. Kaminski v Grand Truck Western Railroad Company, 347 Mich 417, 422; 79 NW2d 899, 901 (1956) actually quoted from an Alabama Supreme Court case and addressed the difference between a “conjecture” and a “theory of causation” and also pointed out as follows:

...if there is any evidence which points **to any 1 theory of causation**, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, **notwithstanding the existence of other plausible theories with or without support in the evidence.** [emphasis added]

In Kaminski, the court went on to quote a California case at 422, and stated as follows:

If, however, plaintiff has proven sufficient facts to justify a verdict on one theory, the fact that there may be one or more other seemingly rational explanations of the episode in no manner precludes a recovery or invalidates the verdict. These are mere matters of argument to be presented to the jury.

The Kaminski opinion indicated that a “conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference...if there is evidence which points to any one theory of causation, indicating a logical sequence and effect, then there is a juridical basis for such determination, notwithstanding the existence of other plausible theories with or without support in the evidence.”

Also cited in Skinner, at 164.

Notwithstanding the facts in evidence substantiating the existence of head compression and closed head injury, established as having taken place during labor through facts in evidence including the review of the fetal-uterine monitor recordings, the newborn examination, the newborn picture and later MRI of the brain and neurological work-up, both Dr. Gabriel [236a-237a, lines 9-13, “fetus gets less blood flow from the placenta producing reduced flow to the fetal brain”] and Dr. Gatewood [144b reduced blood flow, reduced oxygen caused] clearly testified to the same exact mechanism of Pitocin-induced contractions reducing blood supply and therefore reducing oxygen delivery to the fetus and the fetal brain. Given the fact that Dr. Gabriel testified to the



existence of brain injury caused by this lack of blood flow during labor, this theory of causation alone, which is based on the multitude of facts in evidence already cited, supra, therefore precludes appellate challenge under either issue before this Court, and instead, should lead to validation of the verdict under Kaminski. See also Mulholland, at 415. ("It is enough that the plaintiff establishes a logical sequence of cause and effect, notwithstanding the existence of other theories, although other plausible theories may also have evidentiary support." citing Holloway v General Motors Corp (On rehearing), 403 Mich 614, 623; 271 N.W.2d 777 (1978))

#### IV. CONCLUSION AND REQUESTED RELIEF

Given the numerous admissions of deviations from the standard of care by defendant Gennaoui and defense witnesses arising out of the records in evidence; given the admitted 6 and 1/2 hours of non-stop infusion of Pitocin without ever decreasing the dose; given the four hospital record pages establishing that two nurses each placed Pitocin into the separate IV solutions connected to Ms. Craig; given the continuous fetal-uterine monitoring records which show hours of repeated decelerations culminating in severe decelerations indicative of head compression, compression of the blood supply to the fetus and therefore lack of oxygen supply injurious to the fetal brain, and which also show rising uterine pressure baselines, non-relaxing uterine pressures, coupling of contractions, and abnormally long contractions all indicative of inappropriate Pitocin administration; given the inadequate monitoring; given the newborn nursery's nursing examination which documents abnormal physical signs consistent with having survived hypoxia-ischemia and trauma (head molding, "color of skin black" which later was noted to become "clear", tachypnea, tachycardia, large umbilical cord); given the documented need for an attempted fetal resuscitation with maximum amounts of oxygen given by mask to the mother 51 minutes before delivery, after a very prolonged period of repeated decelerations associated with contractions indicative of repeated intermittent blood supply compression and head compression; given the newborn hospital photograph which shows a prominent swollen ridge across the newborn's forehead indicative of a facial molding pattern, abnormal extreme deviation of the eyes to the right, left sided cortical thumb neurological finding, and

bruising and edema all indicative of trauma; and given the pattern of brain damage revealed on the University of Michigan's MRI of the brain "most pronounced in the postero-frontal and parietal lobes" [22b] consistent with the type of brain injury which occurred during labor; there is no doubt that plaintiff's case at trial arose from and was entirely grounded in facts in evidence.

Given the invalidity of Oakwood's attempt, after dropping the issue pre-trial, to again raise the notion that Pitocin potentially causing a traumatic head injury against mother's anatomy was somehow an issue in dispute; given the fact that the lower court three months before trial granted Oakwood's request to file additional pleadings regarding their Davis-Frye hearing request and specifically asked for a supporting affidavit and Oakwood never raised the issue again and never filed any additional pleadings; given the fact that the request was not in any way related to the "novel scientific evidence" purpose of a Davis-Frye hearing; given the fact that all defense causation witnesses and defendants admitted that Pitocin can and does cause fetal trauma and brain damage; there is no legitimate basis to argue now that the lower court erred or engaged in any harm in not providing a Davis-Frye hearing.

For all of the reasons stated, Plaintiff-Appellee respectfully requests that this Court deny all aspects of Oakwood's appeal and sustain the decisions by the Court of Appeals and the lower court of this great State.

Respectfully Submitted,

Mark L. Silverman, M.D., J.D., P.C.

By: Mark L. Silverman MD  
Mark L. Silverman, M.D. (42992)  
Appellee Counsel for Antonio Craig  
401 S. Old Woodward, Suite 435  
Birmingham, MI 48009  
(248) 647-0390

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